IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

Supreme Court, U. S.
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72-174

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, [redacted],

Petitioners,

vs.

WILLIAM COUSINS, JR., A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL and MARY LEE LEAHY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, City Council of the City of Chicago and Richard J. Daley, individually and as Mayor of the City of Chicago, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 25, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals, filed on May 25, 1972, is as yet unreported, but is reproduced in Appendix B to this Petition. The dissenting opinion of Circuit Judge Stevens is also included in Appendix B.

The findings of fact, conclusions of law and decree of the District Court, entered on January 22, 1971, are reported at 322 F.Supp. 428 (N.D., Ill., 1971), and are reproduced in Appendix A.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 25, 1972 (Appendix B). On June 23, 1972, the Court of Appeals entered an order denying a petition for rehearing with suggestions for rehearing in banc. This order of denial of a rehearing is reproduced in Appendix C.

A motion for stay of the mandate pending application to this Court for a Writ of Certiorari was filed on June 29, 1972. An order was entered by Circuit Judge Fairchild on July 5, 1972, staying the mandate for a period of 30 days, that is, until Monday, July 31, 1972.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether due representation of persons of a certain racial identification requires that the proportion of the number of legislative districts in which the majority is of such racial identification must be the same as the group's proportion is to the total population, where the one-man, one-vote standard has concededly been maintained.

2. Whether the validity of legislation can properly be determined by a judicial examination into the motivation of individual legislators.

3. Whether a reviewing court can, after finding that plaintiffs, in a fair trial, have not proven their case, grant them a new trial.

4. Whether it is the province of a reviewing court to determine the credibility of witnesses.

CONSTITUTIONAL PROVISION, STATUTES AND ORDINANCE INVOLVED.

I.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II.

UNITED STATES CODE, Title 42:

"§ *1983. Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

III.

ILLINOIS REVISED STATUTES (1971), ch. 24:

"§ *21-36. City to have fifty wards.)*

"The City of Chicago shall be divided into fifty wards. In the formation of wards the population of each shall be as nearly equal as practicable and each shall be composed of contiguous and compact territory."

"§ *21-38. Redistricting every ten years.)*

" xxxxxxxxxxxxxxxxxx

"On or before the first day of December, of the year following the year in which the national census is taken, and every ten years thereafter, the city council shall by ordinance redistrict the city on the basis of the national census of the preceding year. All elections of aldermen shall be held from the existing wards until a redistricting is had as provided for in this article."

IV.

MUNICIPAL CODE OF CHICAGO, ILLINOIS, Sections 4-13 through 4-64, inclusive.

This ordinance, which defines the boundaries of each of the 50 wards of Chicago, is too voluminous to be included in this petition. The ward map, which also delineates the ward boundaries, is part of the ordinance. The map has been printed as part of the opinion of the Court of Appeals (see Appendix B, p. 4) and is reproduced in Appendix B, p. 28.

STATEMENT OF THE CASE.

This case concerns the constitutionality of the present apportionment of the City Council of Chicago. The respondents, who were the plaintiffs below, claim that its districting embodies racial, ethnic and political gerrymandering in violation of the equal protection guaranteed by the Fourteenth Amendment.

The present division of the fifty wards of Chicago was enacted on November 6, 1970, on the basis of the 1970 census. However, litigation contesting the apportionment of the wards of Chicago began in 1966. That lawsuit had challenged the 1961 ordinance, grounded upon the 1960 census, as violative of the "one-man, one-vote" rule. In 1968 the U.S. District Court for the Northern District of Illinois found impermissible deviations in the 1961 ordinance, enjoined further general elections under it and directed that a new districting ordinance, based on the 1970 census, be enacted and filed by November, 1970. The Court of Appeals for the Seventh Circuit affirmed this result and certiorari was denied by this Court. *Skolnick* v. *Mayor and City Council of Chicago*, No. 66 C 2134 (DC, ND, Ill., 1968), affd. 415 F2d 1291 (7 Cir., 1969), cert. den. 397 U.S. 954 (1970).

As previously stated; the City Council of Chicago on November 6, 1970 adopted the ordinance reapportioning the fifty wards of Chicago on the basis of the 1970 census. On November 14, 1970, this ordinance was approved by the District Court as constitutional. *Skolnick* v. *Mayor and City Council*, 319 F.Supp. 1219 (ND., Ill., 1970). The Court of Appeals affirmed that judgment, holding the 1970 ordinance satisfied the "one-man, one-vote rule." *Skolnick* v. *Mayor and City Council of Chicago*, No. 18878 (7 Cir., December 18, 1970).

The present action was filed on December 22, 1970 by five opposition aldermen, two unincorporated political associations and several black and Puerto Rican individuals. Subsequently,

an independent candidate for alderman intervened. It was claimed that, notwithstanding the close approximation of the wards to precise equality of population, the ordinance was invalid by reason of gerrymandering that diluted the voting strength of various racial and political groups.

Because of the imminence of the February 23, 1971, general aldermanic election, which the plaintiffs had sought to enjoin, the District Court expedited the case and hearings began on December 29, 1970, one week after this suit was filed. The trial continued until January 18, 1971, and on January 22, 1971, the District Court filed its findings of fact and conclusions of law and entered judgment in favor of the defendants. *Cousins* v. *City Council of City of Chicago*, 322 F.Supp. 428 (N.D., Ill., 1971). Plaintiffs immediately appealed and the case was, by order of the Court of Appeals, briefed and argued as an emergency matter. However, the Court of Appeals denied plaintiffs' motion to stay the general aldermanic election of February 23, 1971.

The Court of Appeals, by a 2 to 1 vote, on May 25, 1972, reversed the judgment of the District Court and remanded the case for further proceedings. The majority opinion of the Court of Appeals is rather complex. First, it holds (Appendix B, pp. B23, B24) that there is no principle requiring a minority racial or ethnic group to have any particular voting strength reflected in the legislative districting. On the contrary, it rules that the true principle is that such voting strength "must not be purposefully minimized on account of their race or ethnic origin."

Then the Court finds (*id.*) that the plaintiffs established that the location of predominantly black and Puerto Rican areas was considered by Alderman Keane, the chairman of the City Council subcommittee that drafted the ordinance, as the subcommittee prepared to formulate the new ward boundaries. To support this finding, the majority opinion cites certain conversations some political science student internes said they heard in Keane's law office. On the other hand, the majority opinion notes (Appendix B, p. B24) that the transcript of proceedings before the subcommittee does not suggest anything other than an attempt to create wards of equal population and some degree of compactness, and even cites the opinion of plaintiffs' own expert on demography, Mr. deVisé that the major consideration in drawing the wards was not race, but retention of the old wards insofar as possible. Finally the Court of Appeals concludes (Appendix B, pp. B24, B25):

> "Plaintiffs did not produce other persuasive circumstantial proof that the ward boundaries were the product of purposeful discrimination . . .
>
> "[W]e are unable to say that plaintiffs' evidence so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court so to find . . . We are of the opinion, however, that the type of rights involved here requires special care that claims of impairment be thoroughly inquired into . . .
>
> "We conclude . . . that the proper and just result is a new trial of the issues . . .
>
> "The judgment is reversed and the cause remanded for further proceedings consistent with this opinion."

An extensive dissenting opinion was filed by Circuit Judge Stevens (Appendix B, pp. B33-B58).

He observed that since district boundaries are drawn by the legislative process, they will inevitably reflect awareness of group interests and compromises. An inquiry into the motives of individual legislators, such as the majority opinion embarked upon (and which by its remand it has directed be more fully pursued in the trial court), Judge Stevens deemed improper (Appendix B, p. B49), terming it a view consistently rejected by this Court since 1810.

The conclusion Judge Stevens reached in his dissent was that in the instant districting, significant population disparities having been eliminated, the main guideline of the Chicago City Council was retention, insofar as possible, of the old ward boundaries, and this was, he said, a valid State objective and any adverse impact on plaintiffs was merely a by-product (Appendix B, pp. B57, B58); therefore, it could not be said that the redistricting ordinance is invidiously discriminatory.

Defendants filed a petition for rehearing, with suggestions for rehearing in banc, on June 8, 1972, which was subsequently denied on June 23, 1972.

REASONS FOR GRANTING THE WRIT.

I.

THIS CASE IS RIPE FOR REVIEW BY THIS COURT SINCE ISSUES OF GREAT PUBLIC IMPORTANCE AND NOVEL CONSTITUTIONAL QUESTIONS ARE INVOLVED.

Although the judgment of the Court of Appeals does not finally dispose of the controversy, but remands the case to the District Court "for further proceedings consistent with . . . [its] opinion" (Appendix B, p. 29), this case is nevertheless ripe for review by this Court.

From time to time this Court has reviewed decisions of a Court of Appeals that ordered a case remanded for trial. On occasion this Court has done this even where the prior proceedings below had been limited to granting a motion to dismiss, and had not, as here, involved a full trial on the merits. Thus, in *Land* v. *Dollar*, 330 U.S. 731, at 734, n. 2 (1947), this Court said, "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.' " In *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949), this Court repeated the same statement of law.

Certiorari has been granted where a non-final judgment presents a novel and important question of law, which is fundamental to the further conduct of the case, and where, as here, the petitioners' position, if sustained by this Court, will terminate the litigation. *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372 (1893). See also *United States* v. *General Motors Corp.*, 323 U.S. 373, at 377 (1945).

In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, at 152 (1964), this Court again declared:

> "Under Section 1291 an appeal may be taken from any 'final' order of the district court. But as this Court often has pointed out, a decision "final' within the meaning of Section 1291 does not necessarily mean the last order

possible to be made in a case . . . The requirement of finality is to be given a 'practical rather than a technical construction.' "

This litigation involves issues of great public importance, and it presents novel, subtle and momentous questions of constitutional law which are fundamental to the further conduct of the action.

In this controversy the constitutionality of the duly enacted reapportionment of the City Council of Chicago is impugned on the ground that it was devised so as to dilute the voting strength of black, Puerto Rican and independent voters. This attack is made despite the fact that the reapportionment was approved and certified in prior litigation as fully satisfying the "one-man, one-vote" rule. *Skolnick* v. *Mayor and City Council of Chicago*, 7 Cir., 1970, No. 18878 (unreported).

This ward map, drawn on the basis of the 1970 census, was delineated at 16 public hearings of a City Council subcommittee charged with the task, and was then the subject of open debate in the City Council, where it was voted upon by each alderman then serving and adopted by a vote of 41-6. These hearings were conducted pursuant to the supervision and direction of the District Court. *Skolnick* v. *Mayor and City Council*, 319 F.Supp. 1219 (N.D., Ill., 1970).

On the basis of this reapportionment, general aldermanic elections were held in February, 1971, with several run-offs in April, 1971. At these elections, which were expressly authorized by the Court of Appeals, 50 aldermen were elected (48 of whom are still serving), at an expense to the taxpayers of Chicago of some two million dollars.

Now, after these extensive City Council committee meetings and protracted litigation (in which the District Court directed and supervised the drawing of the map from its inception), the majority opinion of the Court of Appeals will, unless this Court intervenes, reopen the entire question, leading to further trial, further appeals, potentially further legislation, and, if so, still

more renewed litigation. The needless result of this will be additional heavy expense to the taxpayers of the city, the distraction of the City Council from the many real problems of a great metropolis, and the erosion of the confidence of the people in their duly elected legislators.

This undesirable state of uncertainty in the public affairs of the second largest city in the United States is created by the majority opinion of the Court of Appeals on the basis of substantive rulings that are in direct conflict with the applicable decisions of this Court and with decisions of other Circuits. Furthermore, the result reached by the majority opinion was arrived at by egregious departure from standard appellate jurisdiction and procedure.

For these reasons, which will be developed more fully, we request this Court to grant a writ of certiorari.

II.

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

(1) As originally conceived and in large measure tried, plaintiffs' case was and is based upon the theory that, under the Constitution, the proportion of wards in which the majority is of black or Puerto Rican identification must be the same as the proportion of the number of persons of such racial or ethnic identification is to the total population.

The majority opinion of the Court of Appeals purports to reject this theory with the statement that (Appendix B, pp. B23, B24):

> "There is no principle which requires a minority racial or ethnic group to have any particular voting strength reflected in the council. The principle is that such strength must not be purposefully minimized on account of their race or ethnic origin."

However, in remanding the case to the District Court, the

Court Appeals indicated (Appendix B, pp. B24, B25) that a "demonstration that one or more maps could be drawn, using the data available to the city in October, 1970, achieving population equality, and at least a similar degree of compactness, which would produce more than 15 wards with a clear majority of one or the other or both the black and Puerto Rican groups" would be "persuasive circumstantial proof that the ward boundaries were the product of purposeful discrimination." That the defendants has "offered no proof that this could not be done" was a factor the majority opinion took into consideration in remanding this case for a new trial of all the issues. Therefore, it cannot be said that the Court of Appeals rejected plaintiffs' proportional representation theory.

This de facto position of the majority contradicts the applicable decision of this Court in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). In *Whitcomb* this Court reversed a three-judge District Court of the same Seventh Circuit, which had invalidated an Indiana legislative apportionment on the ground that the multi-member Marion County (Indianapolis) legislative electoral district illegally minimized and diluted the voting power of a cognizable racial minority in the ghetto. The plaintiffs in *Whitcomb* introduced far more elaborate and precise statistical information as to the racial distribution of population than have plaintiffs in the case at bar. Yet, this Court held (at 149, 153) that:

> ". . . .the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population [did not] satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political process and elect legislators of their choice . . ."

The opinion of The Court of Appeals herein is also in conflict with another leading case of this Court involving claimed racial gerrymandering—*Wright* v. *Rockefeller*, 376 U.S. 52 (1964). In

Wright this Court affirmed the decision of a three-judge District Court, which had dismissed a complaint that charged that a statute apportioning congressional district in the Borough of Manhattan in New York City violated the Fourteenth and Fifteenth Amendments by concentrating non-white voters and citizens of Puerto Rican origin in one of four congressional districts, which they termed "Ghettoizing the Island of Manhattan" (at 54), since it was impossible, plaintiffs claimed, to have district such as these unless they "were drawn with regard to race." This evidence showed that the proportions the Negro and Puerto Rican populations of the districts bore to the total pupulations of the respective districts were 86.3%, 28.5%, 27.5% and 5.1%. This Court affirmed on the ground (376 U.S. at 55, 56) that, although the plaintiffs had introduced evidence which might justify an inference that racial considerations motivated the apportionment, other inferences were equally or more justifiable–particularly that "the concentration of colored and Puerto Rican votes in one area in the county made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of these voters among the districts" (at 57). The majority opinion in *Wright* remarked (376 U.S. at 55, 56) "Plaintiffs have a difficult burden to meet in attacking the constitutionality of the state statute." It was held in *Wright* that, under the evidence presented, the trial court was not *compelled* to find the ward boundaries were a discriminatory *contrivance*. In like manner, in the instant matter, the evidence presented by the plaintiffs does not compel a holding that the ward boundaries of Chicago are a disciminatory ploy.

Instead, the Court of Appeals has held (Appendix B, pp. B24, B25) that, although plaintiffs failed to prove their case, the defendants failed to prove the negative, and therefore the plaintiffs are entitled to a new trial at which, hopefully, plaintiffs may at last be able to produce more cogent evidence than they have hitherto adduced.

The opinion of the Court of Appeals herein is also in conflict with the very recent summary affirmance by this Court of a three-judge District Court in *Ferrell* v. *State of Oklahoma ex rel.*

Hall, __ U.S. __ , 40 L.W. 3553 (May 22, 1972). (A summary affirmance by this Court is a decision on the merits. ***Stern and Gressman, Supreme Court Practice*** (4th ed., 1969), p. 197, citing *Barton* v. *Sentner*, 353 U.S. 963 (1957)).

In *Ferrell* this Court held that the fact that the Oklahoma legislature did not create in Tulsa County a single state senatorial district in which Negro citizens constituted a clear majority, but, on the contrary, included parts of the Negro community in each of three senatorial districts, did not result in a denial of equality. Such a situation is comparable to what plaintiffs claim is the case of the Puerto Rican community in Chicago, where, with the wards as drawn, Puerto Ricans form large minorities in three wards, whereas if the wards had been drawn differently, Puerto Ricans might have had a majority in one, possibly two wards. (Appendix B, p. B7). The evidence presented in *Ferrell* was strikingly similar in other ways as well, but stronger and less ambiguous than in the instant case. In *Ferrell* the legislator who had the leading role in drafting the reapportionment acknowledged knowing about the geographical distribution of the black population. Trial maps were also devised before the official map was drawn.

Yet in the case at bar, the Court of Appeals reaches a result opposite to that in *Ferrell*, by devising as the de facto, working rationale of its decision, an unparalleled rule, that passing consideration, mere mention, mere awareness of local racial residential patterns on the part of a single member of the legislative branch active in drafting the apportionment is sufficient to invalidate the final enactment of the entire legislative body. It is true, the majority opinion does avow (Appendix B, p. B15), "[W]e do not suggest that proof of awareness alone would establish invidious discrimination." But the majority does indeed follow such a rule of thumb and could not have reached the result it did in any other way.

(2) The majority opinion of the Court of Appeals is predicated primarily upon a purported inquiry into the motives

on one or two members of the 50 member City Council. Of the 27 pages of the majority opinion, 14 pages are devoted to such an attempted analysis of legislative motivation (Appendix B, pp. B8-B20, B24, B25). This is for the most part a query into the motivation of Alderman Keane, the chairman of the subcommittee that prepared the ordinance for council approval. And the Court of Appeals attempts to accomplish this by a study of a few casual remarks attributed to Alderman Keane, and more extensively by imputing remarks of his administrative assistant, Bell, to Keane.

The conclusion the majority arrives at as a result thereof is that, although they are "unable to say that the plaintiffs' evidence so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court so to find" (*id.*, p. B25), yet, since the majority is suspicious of the motives of one or two aldermen in drafting the ordinance, there must be a new trial of the same issues (*id.*).

As recently as *Palmer* v. *Thompson*, 403 U.S. 217, at 224 (1971), this Court stated:

> "[N]o case in the history of this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."*

This error was adhered to by the majority opinion despite the warning of Judge Stevens, in dissent, that invalidation of legislation on the basis of improper subjective motivation of individual members of the legislative body is an approach that "[f]or reasons first articulated by Chief Justice Marshall . . .has been rejected by the Supreme Court consistently since 1810." *Fletcher* v. *Peck*, 6 Cranch 87, at 130 (1810); *United States* v. *O'Brien*, 391 U.S. 367, at 382-384 (1968). Appendix B, p. B49)

As Judge Stevens stated (Appendix B, pp. B49, B50):

> "[C]ustomary indicia of legislative intent provide an adequate basis for ascertaining the purpose that a law is

**Palmer* (at 225) also distinguished *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), cited by the majority (at B21) as a case not involving motivation, but the actual effect of the enactment in question.

> intended to achieve. The formal proceedings of the legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents, provide appropriate evidence of legislative purpose."

As Judge Stevens also observed (Appendix B, pp. B50, B51):

> "[I]t demeans the legislative process to inquire into private conversations between aldermen or to draw an invidious inference from the fact that members of the Council are 'acutely aware' of the racial composition of changing areas of the City. Of course they are. Responsible legislators are expected by their constituents, black and white, rich and poor, to be informed about such matters."

The hundreds of pages of the legislative proceedings concerning this ordinance contain no evidence of a discriminatory purpose. The effect of the measure, as evidenced by its text, is to satisfy the "one-man, one-vote" rule. That it does this is res judicata. *Skolnick* v. *Mayor and City Council of Chicago*, 7 Cir., 1970, No. 18878 (unreported). The historical setting of the ordinance was prolonged litigation over application of the "one-man, one-vote" rule to the ward districting of Chicago. The public acts and deeds of its sponsors and opponents, that is, the debates on the measure in the City Council, are similarly devoid of evidence of a discrimantory purpose.

This Court, we submit, should not permit this case to be remanded to the trial court for the purpose of conducting a still more extensive, improper examination into the subjective motivation of individual aldermen. Instead, this Court should reverse the Court of Appeals and affirm the District Court, thereby terminating this litigation.*

(3) The opinion of the Seventh Circuit in this case is in

*As recently as *Wright et al.* v. *Council of the City of Emporia et al.*, ___ U.S. ___, 40 L.W. 4806 (June 20, 1972), the Court again disapproved of an inquiry into the motivation of individual members of a legislative body or of the legislative body itself in considering enacted legislation.

conflict with a recent decision of the Fourth Circuit. The Fourth Circuit, sitting in banc, recently upheld the constitutionality of an annexation agreement of the city of Richmond, Virginia, over objections that the annexation was unconstitutionally motivated, noting that legislation may not be stricken because of suspect legislative motivation. *Holt* v. *City of Richmond*, __ F.2d __ , 40 L.W. 2767 (4th Cir., decided May 3, 1972). Obviously, there is a conflict between the Fourth Circuit and the Seventh Circuit with respect to the issue of the propriety of an inquiry into the motives of members of the legislative branch.

III

THE OPINION OF THE COURT OF APPEALS NECESSITATES THE EXERCISE OF THE SUPERVISORY POWERS OF THIS COURT BECAUSE IT HAS BEEN ARRIVED AT BY GROSS DEPARTURES FROM STANDARD APPELLATE PRACTICE AND PROCEDURE.

(1) Reapportionment cases are no exception to the general rule that determination of the credibility of witnesses is the province of the trier of the facts. *Wright* v. *Rockefeller*, 376 U.S. 52, at 56, 57 (1964). This Court has frequently admonished reviewing courts that, in applying the "clearly erroneous" standard to the findings of a district court sitting without a jury, they should have it constantly in mind that their function is not to decide factual issues *de novo*. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, at 123 (1969).

In fact, the late Justice Black stated in *Wright supra* at 56, 57):

> "We accept the findings of the majority of the District Court that appellants failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines. Compare *Gomillion* v. *Lightfoot*, 364 U.S. 339. *It may be true*, as Judge Feinberg thought, *that there was evidence which could have supported inferences that racial consideration might have moved the state legislature, but, even if so, we agree that there also was evidence to support his finding that the contrary inference was 'equally, or more, persua-*

> *sive.' Where there are such conflicting inferences one group of them cannot, because labeled as 'prima facie proof,' be conclusive on the fact finder so as to deprive him of his responsibility to choose among disputed inferences.*" (Emphasis supplied.)

In the instant matter the majority opinion of the Court of Appeals departs from this rule in, for example, the crucial question of the testimony in regard to the students' map. Although the District Court found plaintiffs' star witness, Taylor, "confused" (Ad. A 861), the Court of Appeals based its reversal of the District Court largely on Taylor's testimony. The Court of Appeals also discounted the testimony of Bell, the administrative assistant to Alderman Keane, on the basis of Professor Murray's purportedly impeaching testimony, which consisted of Murray's subjective conclusory estimate of what he testified he observed was Bell's subjective emotional reaction when the students' map became an issue in the trial (Appendix B, pp. B12). The Court of Appeals made these determinations as to the credibility of the witnesses although it had, of course, not seen or heard any of them testify.

(2) In reversing and remanding this case, the Court of Appeals has resort to a bizarre principle that makes *res judicata* meaningless.

The express language of the majority opinion clearly states (Appendix B, p. B25):

> "[W]e are unable to say that plaintiffs' evidence so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court so to find . . . We are of the opinion, however, that the type of rights involved here requires special care that claims of impairment be thoroughly inquired into . . .
>
> "We conclude . . . that the proper and just result is a new trial of the issues."

This outlandish conclusion is arrived at in the majority opinion on the basis of a holding, never before recognized by any court, that failure of plaintiffs to prove their case does not

justify entry of judgment against them unless the defendants also prove the negative. Thus, the majority opinion states (Appendix B, pp. B24, B25):

> "Plaintiffs did not produce other persuasive circumstantial proof that the ward boundaries were the product of purposeful discrimination, such as demonstration that one or more maps could be drawn, using the data available to the city in October, 1970, achieving population equality, and at least a similar degree of compactness, which would produce more than 15 wards with a clear majority of residents of one or other or both the black and Puerto Rican groups. Defendants, on the other hand, offered no proof that this could not be done."

This incredible ruling was formulated in the face of findings by the majority itself (Appendix B, pp. B5, B6, B23) that the total population of Chicago, shown by the 1970 census at the time the ordinance was enacted, was 3,329,090, that the goal of the reapportionment was to draw wards each containing 1/50 of that number, or 66,582, that, "[t]he reapportionment very closely approached that goal," that Chicago has a black population of 1,102,620 or 32.7% of the total population, that there are 15 wards in which a majority of the residents are black, that these 15 wards elect 30% of the city's aldermen, and that 14 of these 15 wards elected black aldermen and the 15th (the 5th ward) re-elected plaintiff Alderman Despres, a white.

The majority opinion of the Court of Appeals would thus nullify four weeks of trial, in which District Judge Perry, laying aside all other business, day after day patiently listened to everything plaintiffs had to offer and, almost always overruling defendants' repeated objections, let in practically every shred of material plaintiffs presented, no matter how inconsequential. The transcript of the last days of the trial shows that the plaintiggs literally ran out of evidence.

IV.

THE FINDING OF THE COURT OF APPEALS THAT THERE WAS EVIDENCE OF RACIAL MOTIVATION IN THE DRAFTING OF THE REDISTRICTING ORDINANCE IS TOTALLY WITHOUT SUPPORT.

(1) The majority's view that the student's map had a substantial effect on the official map is itself "clearly erroneous." It treats a crude ward map* that certain students attempted to draw as though it was the instrument by which the reapportionment of Chicago was effected by Alderman Keane all by himself. The majority brushes aside the 16 days of public hearings on reapportionment before the City Council Subcommittee as though hearings had never taken place.

Actually, as is set forth at length in the record, a great deal of patient, laborious preliminary mathematical research by way of analysis of the census tracts and enumeration districts and their relation to both the geography and demography of the city was required so that the City Council would be in a position to know what viable choices were open to it in redistricting. That preliminary work was done not by students, but by professionals, It was done under the supervision of Lewis W. Hill, Commissioner of Development and Planning and Commissioner of Urban Renewal of the City of Chicago. The Mayor assigned this task to Mr. Hill in August, 1970 (Add. A., vol.I,81) –several weeks before the students began work on their little map on September 11,1970 and before they knew of the existence of such a project. Mr.Hill testified at length concerning the mechanical and technical procedures employed in drawing the 1970 ward map. (Add. A., vol. I, pp.1A-120), but the majority opinion wholly ignores Mr. Hill's testimony.

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*Far from achieving the goal of 50 wards as nearly as possible mathematically equal in population, on the students' map the most populous ward was the 17th with 77,826 and their least populous ward was the 45th with 54,946–a spread of 22,880–more than one-third of the students' median of 66,400. This is hardly mathematical equality. In contrast, on the official ward map adopted by the City Council, there is a spread of no more than 9/10ths of one percent between the most populous and the least populous ward.

The 16 days of hearings before the City Council subcommittee were no empty formality. Community groups, the press, individual members of the public and all aldermen were invited to participate. The three plaintiff aldermen, Cousins, Despres and Singer, all actively participated. For example, Alderman Singer spoke at length concerning the boundaries of the 43rd Ward, criticizing the reported numerical composition of certain census tracts. After Mr. Hill investigated the matter, it was ascertained that the criticisms were well founded, and appropriate corrections were made, with consequent relocation of that ward's boundaries. Alderman Singer then acknowledged that the corrections were satisfactory (Add. A. filed in *Skolnick* v. *Mayor and City Council of Chicago*, 7 Cir., No. 18878, vol. II, 632-660).

Parenthetically it should again be noted that the map was subsequently adopted by the full Council by a vote of 41 to 6.

(2)The evidence upon which the majority based its conclusion that alleged racial considerations on the part of Alderman Keane with respect to five of the 50 wards may have resulted in some discriminatory effect finds little or no support in the record. Furthermore, the Court by its own admission failed to find much, if any, of the evidence persuasive.

For example, in regard to the 7th Ward, the majority relies on the testimony of witness Taylor (the campaign manager of the intervenor-plaintiff) to the effect that Mr. Bell (not Mr. Keane) wanted to keep Alderman Bohling (a white) in the 7th Ward and that after several redraftings, one predominantly white census tract was shifted into the 7th Ward and was offset by shifting predominantly black tracts to the 8th Ward. The Court, however, notes (1) that Alderman Bohling was previously elected in the old 7th Ward which was predominantly black; (2) that the switching of tracts resulted in greater compactness; and (3) that proof of awareness of the racial composition of the switched tracts would not of itself establish invidious discrimination (Appendix B, pp. B14, B15).

In regard to the 31st Ward, the Court again relies on the testimony of Mr. Taylor that Mr. Bell (not Mr. Keane) had some comments to make concerning the inclusion of a few tracts (Appendix B, pp. B15, B16) and concludes "that it could be inferred that the contours of the 31st ward were chosen for the purpose of avoiding the presence of Puerto Rican residents" The 31st Ward, however, has a Puerto Rican, population of 30-35%. (id., p. B24), and there is no evidence that Alderman Keane either directly or indirectly attempted or intended to exclude the presence of Puerto Rican residents.

In regard to the 14th and 16th Wards, the Court again relies on comments about "saving" these wards for two white alderman. However, the Court notes that although the two wards would have been predominantly white on the map drawn by Bell, the Council map resulted in the 16th Ward being 95.3% black (id., p. B16). Again, the Court, by its own admission could find no relationship between casual comments and the ultimate map.

The Court noted testimony that the shape of the 18th Ward suggests some possible form of racial consideration and if drawn differently the ward would have had fewer blacks who could have, theoretically, been included in another ward where blacks were already in the majority (Appendix B., pp. B17, B18). The Court, however, failed to consider that the east-west shape of the 18th Ward was largely dictated by fixed city boundaries to the west and south, and by a nonresidential industrial area to the north (Appendix B., p.B31; Add'l App., Vol. 2, p.502). The Court's conclusion that the shape of this ward may have been the result of racial considerations is unwarranted by further the fact that the wards immediately adjoining the eastern terminus of the 18th ward (the 17th and 21st Wards) are already overwhelmingly black (97.6% and 86.4%) (Appendix B, p.B6; testimony of Alderman Cousins, Add'l App., Vol. 2, p.501). Furthermore, the Court recites not a single bit of evidence that race was even mentioned by anyone in connection with the 18th Ward

prior to the trial of this cause. In any case, it is impossible to conceive how any dilution or discrimination of voting power could result from failing to place more black voters in other wards where they already constitute the overwhelming majority.

Finally, the Court incredibly and candidly admits, in spite of its subjective findings that some racial considerations could be inferred from the foregoing evidence, that the 1970 map produced 15 black majority wards, that the transcript of proceedings does not suggest anything other than an attempt to create compact wards of equal population, that plaintiffs' population expert testified that race was not a major consideration in drawing the 1970 map,* and that plaintiffs produced no other persuasive proof (Appendix B, pp. B24, B25).

In view of the fact that the Court's findings were either unsupported or rebutted in the record or were by its own admission not proof of any invidious discrimination, its decision based thereon affording plaintiffs a second chance to prove their case is not only unprecedented but unwarranted.

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*Plaintiffs' own expert witness on the racial composition of Chicago, Pierre de Visé, stated (A. 188-190):

> "I do not think that race was a major consideration. I think that the major consideration was probably the retention of the old wards. . . . I would look on the retention of the old wards with all of the kinds of pressure, including racial consideration that went into these wards, [as] the major determination of what the new wards were like." (Appendix B, pp. B24, B57.)

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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July 27, 1972

APPENDIX A

William COUSINS et al., Plaintiffs,

v.

CITY COUNCIL OF the CITY OF CHICAGO, Richard J. Daley, individually and as Mayor of the City of Chicago, and Board of Election Commissioners of the City of Chicago, Defendants.
Civ. A. No. 70 C 3202

United States District Court, N. D. Illinois, E. D.
Jan. 22, 1971.

Action challenging redistricting ordinance on ground that it was racially discriminatory. The District Court, Perry, J., held that ordinance reapportioning wards did not violate the Fourteenth or Fifteenth Amendment, sections of the Civil Rights Acts or state statute. The Court also held that the issue of political gerrymandering was nonjusticiable.

Judgment for defendants.

1. **Federal Civil Procedure**

Plaintiffs challenging redistricting ordinance and seeking injunctive relief failed to establish that there was a class of "all black candidates or prospective black candidates for aldermen" or that they were authorized to represent all voters and persons of Puerto Rican or other Latin American origin and ancestry in city. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. **Civil Rights**

Constitutional Law

Elections

Ordinance reapportioning wards on basis of latest available census information into 50 wards composed of contiguous and compact territory did not violate the Fourteenth or Fifteenth Amendment, sections of Civil Rights Acts or state statute. Fed. Rules Civ. Proc. rule 65(a) (2), 28 U.S.C.A.; U.S.C.A. Const. Amends. 14, 15; 42 U.S.C.A. §§ 1971, 1981, 1983, 1985, 1986, 1988; Voting Rights act of 1965, § 2, 42 U.S. C.A. § 1973; S.H.A. Ill. ch. 24, § 21–36.

3. **Judgment**

Equality of population of wards under redistricting ordinance which had been approved by the United States District Court and by the United States Court of Appeals as valid was res judicata.

4. **Municipal Corporations**

The proportion of the number of wards in which the majority is of a certain racial or ethnic identification need not be the same as the proportion of the number of persons of such racial or ethnic identification is to the total population.

5. **Municipal Corporations**

Reapportionment of wards according to race, ethnic origin, color or creed is constitutionally impermissible.

6. Municipal Corporations

Issue of political gerrymandering– at least in single-member representative districting, such as in the apportioning of wards of city–is nonjusticiable.

Robert Plotkin, Michael L. Shakman, Thomas N. Todd and Gerald Mindell, Chicago, Ill., for plaintiffs.

Richard L. Curry, Corp. Counsel, City of Chicago, Allen Hartman, First Asst. Corp. Counsel, Edmund Hatfield, Asst. Corp. Counsel, and Earl L. Neal, Sp. Asst. Corp. Counsel, William R. Ming, Jr., Chicago, Ill. for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PERRY, District Judge.

The above-entitled cause came on before the Court, sitting without a jury, on December 23, 1970, on Plaintiffs' application for a preliminary and temporary injunction. Thomas N. Todd, Robert Plotkin and Michael L. Shakman appearing for the plaintiffs, and Richard L. Curry, Corporation Counsel of the City of Chicago, Earl L. Neal, Special Assistant Corporation Counsel, Allen Hartman, First Assistant Corporation Counsel, and Edmund Hatfield and Gayle F. Haglund, Assistant Corporation Counsel, appearing for the defendants City Council of the City of Chicago, and Richard J. Daley, individually and as Mayor of the City of Chicago, and William R. Ming, Jr., appearing for the defendant Board of Election Commissioners of the City of Chicago, and depositions having been taken by plaintiffs in open court on December 28th and 29th, 1970, of Aldermen Thomas E. Keane, Claude W. B. Holman, John J. Hoellen and Paul T. Wigoda of the City Council of Chicago, and Lewis W. Hill, Commissioner of Development and Planning of the City of Chicago, the hearing on plaintiffs' application for a preliminary and temporary injunction was held on December 29, 30 and 31, 1970, and January 4, 5, 6, 7, 8, 12, 13, 14, and

18, 1971, the Court on said days having heard the testimony and examined the proofs offered by the respective parties, and having heard the closing arguments of the parties on January 18, 1971, and the Court having, pursuant to Rule 65 (a) (2) of the Rules of Civil Procedure for the United States District Courts, advanced the trial of this action on the merits and consolidated it with the hearing on plaintiffs' application for a preliminary and temporary injunction, as this Court has in the course of such hearing repeatedly informed the parties it was doing, the Court, being fully advised in the premises, now makes the findings of fact as follows:

FINDINGS OF FACT.

1. This is a case brought under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, the United States Code, Title 42, Sections 1971, 1973, 1981, 1983, 1985, 1986 and 1988, and Illinois Revised Statutes, Chap. 24, par. 21–36.

2. Plaintiffs William Cousins, Jr., A. A. Rayner, Jr., Leon M. Despres, William Singer and George Barr McCutcheon are residents, citizens, voters and aldermen of the City of Chicago.

3. Plaintiff Graciano Lopez is a citizen and voter of the City of Chicago and a candidate for alderman in the forthcoming election to be held on February 23, 1971.

4. Plaintiff Independent Voters of Illinois is a voluntary unincorporated association.

5. Plaintiff Committee for an Effective City Council is a voluntary unincorporated association.

6. Plaintiffs William Cousins, Jr., A. A. Rayner, Jr., Rev. Jesse L. Jackson, Rosemary Gulley, Rev. Richard Lawrence, Timuel D. Black, Jr., and Andrew Crout are black persons.

7. Plaintiff Graciano Lopez is of Puerto Rican origin and ancestry.

8. Defendant City Council of the City of Chicago is the legislative body of the City of Chicago. It is comprised of 50 aldermen, one elected from each of Chicago's 50 wards.

9. On November 5, 1970, the City Council of Chicago consisted of 47 members, three vacancies having been occasioned by death after the general aldermanic election. Of the 47 living aldermen, 10 aldermen were black. The other aldermen all had black constituents in their wards in varying numbers.

10. Defendant Richard J. Daley is the Mayor of the City of Chicago and, as such, is the chief executive officer of said city. As mayor, defendant Daley presides over defendant City Council; defendant Daley is also Chairman of the Democratic County Central Committee of Cook County, the governing body of the Cook County Democratic organization.

11. Defendant Board of Election Commissioners of Chicago is the governmental agency charged by law with the duty of administering the election laws applicable to the election of aldermen in the City of Chicago.

12. Plaintiffs have failed to establish that in this cause that there is any class of "all black voters of the City of Chicago" within the meaning of Rule 23 of the Federal Rules of Civil Procedure. Similarly, plaintiffs have failed to establish that in this cause is a class of "all black candidates or prospective black candidates for aldermen in the City of Chicago or for any other public office to be elected in whole or in part by the voters of Chicago or by a segment of such voters."

[1] Plaintiffs have demonstrated that if there were such classes their claims are not typical of such classes and plaintiffs have likewise demonstrated that they could not fairly and adequately protect the interests of any such class. Similarly, plaintiffs have not been authorized to represent in this cause the black voters of the City of Chicago, or any segment thereof or the black candidates or prospective black candidates for public office in the City of Chicago or any segment thereof. On

November 5, 1970, when the ward redistricting ordinance came before the City Council of the City of Chicago, it was composed of 47 aldermen of whom 10 were black persons. Of those black aldermen all save the plaintiffs Cousins and Rayner were among the 41 aldermen who voted for the re-districting ordinance. Only six aldermen, five of whom are among the plaintiffs in this lawsuit and Casimir Staszcuk, voted against the ordinance.

13. The plaintiffs have failed to establish that they, or any of them, are authorized to represent all voters and persons of Puerto Rican or other Latin American origin and ancestry in Chicago; and plaintiffs have failed to establish that plaintiffs are authorized to represent all candidates and prospective candidates of Puerto Rican or other Latin American origin and ancestry in Chicago. Plaintiffs have failed to establish that plaintiffs' claims are typical of the claims of those classes, or that plaintiffs will fairly and adequately protect the interests of those classes.

14. Plaintiffs have failed to establish that in this cause that there is any class of "independent voters of the City of Chicago" within the meaning of Rule 23 of the Federal Rules of Civil Procedure.

Plaintiffs have demonstrated that if there were such classes their claims are not typical of such classes and plaintiffs have likewise demonstrated that they could not fairly and adequately protect the interests of any such class. Similarly, plaintiffs have not been authorized to represent in this cause the "independent voters of the City of Chicago" within the meaning of Rule 23 of the Federal Rules of Civil Procedure.

15. On November 5, 1970, the defendant City Council enacted a redistricting ordinance and map of 50 wards.

16. This redistricting ordinance was enacted pursuant to Section 21–36 of the Municipal Code of Illinois (Ill.Rev.Stat. 1969, ch. 24, par. 21–36), which provides:

"The city of Chicago shall be divided into fifty wards. In the formation of wards the population of each shall be as nearly equal as practicable and each shall be composed of contiguous and compact territory."

17. The redistricting ordinance of November 5, 1970, was enacted in accordance with an order entered by the U. S. District Court for the Northern District of Illinois on September 11, 1968, in Sherman H. Skolnick et al. v. Mayor and City Council, of Chicago, et al., No. 66 C 2134. This order was affirmed by the U. S. Court of Appeals for the 7th Circuit, 415 F.2d 1291 (1969); cert. denied, 397 U.S. 954, 90 S.Ct. 984, 25 L.Ed.2d 138 (1970).

18. The redistricting ordinance and map were drawn at public hearings conducted by a subcommittee of the Committee on Committees and Rules of the Defendant, City Council of Chicago. Sixteen such public hearings were held in the City Hall of Chicago between October 13, 1970 and November 4, 1970, and recorded in full. The verbatim transcript of these hearings, 716 pages in length, has been filed with this Court, has been received in evidence and is part of the record herein.

19. The redistricting was based on mathematical data on population, as was and is required by State statute and Federal Court order, both mentioned above, data prepared by an agency other than the legislative redistricting body—that is, by the Federal Bureau of the Census, which compiled the data for its own administrative purposes in taking a national head count.

That record demonstrates that the sole basis for the shaping and formation of the wards in the City of Chicago drawn at those public hearings was the then available census data with respect to the population of the several census tracts of the City of Chicago.

The 1960 United States Census is the last federal census indicating the numbers of Black, Latin American and other ethnic groups within the City of Chicago. Similar data to be

compiled in the 1970 United States Census is not presently available. Such data compiled in the 1960 United States Census understated the non-white population nationally by at least 10 percent and by more than 10 percent understated the non-white population in Chicago.

20. The members of the Defendant, City Council of Chicago, are elected from single-member districts, as required by State statute.

21. The redistricting ordinance enacted November 5, 1970, is based on the following constants: 50 Wards, a mean population per ward of 66,582, the city limits of Chicago on the North, West and South, the natural boundary of Lake Michigan on the East, and the natural and man-made boundaries within the area of the City, such as the Calumet River and the expressways.

22. At the above-mentioned public hearings of the pertinent subcommittee of the Defendant, City Council, the redistricting ordinance and map were drafted in accordance with an unvarying procedure, wherein census tracts and on occasion, where necessary, census enumeration districts were identified in sequence and population figures supplied by the Bureau of the Census were correlated with compact, contiguous territory, a running total being recorded until the median figure of 66,582 was achieved within a range of less than one percent.

23. One or more of the plaintiffs was present at all, or practically all, of these public hearings.

24. During the drawing of the map of the wards, the plaintiffs made no objection to any specific ward boundary on the grounds of racial, ethnic or political gerrymandering. None of them made any such objection until after the proposed map had been completed, and then only in general terms.

25. Plaintiffs Cousins, Rayner, Despres, Singer and McCutcheon participated as aldermen in the debate on the ordinance in the Defendant City Council and voted against its

adoption. Enactment of the ordinance carried by a vote of 41–6.

26. The redistricting ordinance enacted November 5, 1970, was approved by the United States District Court for the Northern District of Illinois on November 14, 1970, as constitutionally valid. The district Court found that under the 1970 apportionment ordinance, the wards of Chicago are as nearly equal in population as practicable, satisfying the "one man-one vote" rule and are compact and contiguous.

27. This determination was affirmed by the U. S. Court of Appeals for the Seventh Circuit on December 18, 1970, insofar as the wards of Chicago, as now constituted, were held to be mathematically equal in population, insofar as possible.

28. Each of the said 50 Wards is composed of "contiguous and compact territory" in accordance with Section 21–36 of Chapter 24 of the Illinois Revised Statutes.

29. The Defendants have not conspired with each other, or with anyone else, to deprive plaintiffs, or any of them or anyone else, of any of their constitutional rights.

30. The Subcommittee of the Committee on Committees and Rules, and the Committee on Committees and Rules, and the City Council of the City of Chicago, or any of them, in constructing and adopting the ordinance enacted November 5, 1970, redistricting the Wards of the City of Chicago, did not base their legislative determination in this regard on information of any kind or nature of the racial distribution, white and non-white, Latin American, Puerto Rican, or other ethnic or color differential, by residents of the population of the City of Chicago.

31. The last official head count by the U. S. Bureau of the Census enumerating the Black, Latin American and other ethnic groups within the City of Chicago was made in 1960. The 1970 U. S. Census enumerating persons of black, Latin American and other ethnic identification is not presently available.

32. There is no evidence that the Defendant City Council of Chicago, in enacting the 1970 ordinance reapportioning the wards of Chicago, intended to dilute or debase the vote of the black population of Chicago, or that of any other ethnic or religious group.

33. The 1970 reapportionment of the wards of the City of Chicago did not have the effect of diluting or diminishing the vote of the population of the Blacks, Puerto Ricans or any other ethnic groups of the City of Chicago.

34. The testimony on the racial composition of the population of Chicago produced by plaintiffs at the trial consisted of mere estimates and projections, not enumeration, which is the required constitutional basis of apportionment, and was based on inadequate surveys.

35. Under the 1961 ward map duly adopted by the City Council of the City of Chicago, black aldermen were elected in 10 of the wards. Pursuant to the 1970 ward map duly adopted in November of 1970, there are 18 wards which have black candidates seeking election in the aldermanic election to be held February 23, 1971.

36. The definition, number and location of "independent voters" cannot be determined from the evidence presented. There is insufficient evidence to support the allegations that "independent voters" are dispersed or fragmented by the 1970 Chicago reapportionment ordinance.

37. Despite numerous requests by this court the plaintiffs have failed to define within any degree of specificity what they mean by the term "independent voters" which plaintiffs used. There is insufficient evidence to support the allegations of the complaint that "independent voters" are dispersed or fragmented by the 1970 Chicago reapportionment ordinance.

Several graduate students of political science participating in an intern program conducted jointly by the City Council of Chicago and Chicago Circle Campus of the University of Illinois,

under the direction of a person who was both an employee of the City Council and a member of the faculty of that university, drew a map of a possible apportionment of the wards of the City of Chicago in September 1970 as an academic exercise. That said map was based on incomplete and inaccurate census returns, did not succeed in allocating equal populations to its wards, and the wards outlined in the students' project are dissimilar to the wards constituted by the official map. There is no evidence that this students' map was relied upon by the Subcommittee of the Committee on Committees and Rules, the Committee on Committees and Rules or the City Council of the City of Chicago in drafting and adopting the Reapportionment Ordinance.

38. While this Court is of the opinion that claims of political gerrymandering are not justiciable, even if such claims were justiciable, the evidence offered by plaintiff in support of their claim of political gerrymandering was conjectural, insubstantial and minimal, and no finding of political gerrymandering could be predicated thereon.

39. There is no evidence of a threat of irreparable injury to plaintiffs.

40. There would be irreparable harm to the citizens of the City of Chicago if the Aldermanic election, scheduled to be held on February 23, 1971, under the reapportionment ordinance enacted by the City of Chicago on November 5, 1970, were postponed or delayed.

41. There are now six vacancies in the City Council of Chicago occasioned by deaths and resignations.

42. There are at least six wards not now represented by aldermen in the City Council of the City of Chicago. Of those wards three were formerly represented by black aldermen. Accordingly there would be irreparable harm to the citizens of those wards without regard to race, creed or color if the aldermanic election scheduled to be held on February 23, 1971

were not so held.

The vast majority of the non-whites in the City of Chicago live in residential, racially segregated areas which have a greater population density area-wise than the density of population in other areas of the City.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW

1. The fifteenth Amendment to the Constitution of the United States provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

2. The Fifteenth Amendment protects the voting rights of citizens of the United States, whether they be black, white or of any other race or color.

3. The Fourteenth Amendment to the Constitution of the United States provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws.

[2] 4. The ordinance reapportioning the wards, or municipal legislative districts, of the City of Chicago, Illinois, enacted November 5, 1970, does not violate either the Fourteenth or the Fifteenth Amendment to the Constitution of the United States.

5. The 1970 Chicago reapportionment ordinance does not violate U.S. Code, Title 42, Sec. 1971, 1973, 1981, 1983, 1985, 1986 or 1988.

6. The 1970 Chicago reapportionment ordinance does not violate Illinois Revised Statutes, Chapter 24, Sec. 21-36.

[3] 7. The equality of population of the wards of Chicago is now *res judicata*. Skolnick et al. v. Mayor and City

Council of Chicago et al., U. S. Court of Appeals, 7th Cir., No. 18878; decided December 18, 1970.

8. The wards, or legislative districts, of the City of Chicago are compact and contiguous.

[4] 9. Plaintiffs' claim that it is constitutionally essential that the proportion of the number of wards in which the majority is of a certain racial or ethnic identification must be the same as the proportion of the number of persons of such racial or ethnic identification is to the total population, is untenable. Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964); Mann v. Davis, 245 F.Supp. 241 (E.D., Va., 1965); affd. 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965).

[5] 10. The complaint filed by plaintiffs is a plea for segregated reapportionment of the wards, or legislative districts, of the City of Chicago according to race, ethnic origin, color or creed. Any and all such color-conscious segregated basis of apportionment are constitutionaly impermissible. Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603 (1964).

[6] 11. The issue of political gerrymandering—at least in single-member representative districting, such as in the apportioning of the wards of Chicago—is non-justiciable. Wells v. Rockefeller, 311 F.Supp. 48 (S.D., N.Y., 1970), affd. 398 U.S. 901, 90 S.Ct. 901, 26 L.Ed.2d 60 (1970); WMCA, Inc. v. Lomenzo, 238 F.Supp. 916, at 925 (S.D., N.Y., 1965), affd. 382 U.S. 4, 86 S.Ct. 24, 15 L.Ed.2d 2 (1965); Badgley v. Hare, 385 U.S. 114, 87 S.Ct. 338, 17 L.Ed.2d 207 (1967); Sincock v. Gately, 262 F.Supp. 739 (D.C. Del., 1967), Meeks v. Avery, 251 F. Supp. 245 (D.C., Kan., 1966); Bush v. Martin, 251 F.Supp. 484 (D.C., Tex., 1966); Sims v. Baggett, 247 F.Supp. 96 (M.D., Ala., 1965).

Let judgment for defendants be entered accordingly:

A. Denying the entry of a temporary injunction;

B. Denying the entry of a permanent injunction;

C. Striking the class action allegations of the complaint;

D. Striking the conspiracy allegations of the complaint; and

E. Declaring that the wards of the City of Chicago as created by the ordinance enacted on November 5, 1970 are compact and contiguous.

F. Declaring that the Ordinance enacted on November 5, 1970, reapportioning the wards of Chicago, is not racially or ethnically discriminatory, is not violative of the Fourteenth and Fifteenth Amendments of the Constitution and is constitutionally valid.

The court directed the parties hereto to submit proposed Findings of Fact and Conclusions of Law and has read and considered them. It has rejected those proposed by plaintiffs and adopted those proposed by defendants and they are herein above set forth.

The court additionally makes the following findings and conclusions:

The court finds that there are fourteen individual plaintiffs. including the intervenor and that ten of these plaintiffs did not testify or offer any evidence on behalf of themselves or show in any way that they have sustained or may sustain any injuries individually or otherwise because of the Ordinance of the City of Chicago herein sued upon, although several of said plaintiffs were observed by the court to be present at various times during the trial. Plaintiffs Alderman William Cousins, Aldermen Leon Despres, Graciano Lopez and Mrs. Mary Lee Leahy appeared and testified. All four of these plaintiffs who testified stated that they were candidates. Each stated that he or she had no complaint about the size, shape, or racial or ethnical makeup of the Ward in which he or she was running. Each expressed opinions in general terms that there were racial or ethnical

discrimination in the reapportioning of other Wards, but none of them gave or produced any evidence supporting their respective opinions. None of them offered any evidence of any injury that he or she has sustained or may sustain because of the Ordinance. None of said plaintiffs offered any evidence whatever of any constitutional right of his or her that is or may be infringed or impaired by said evidence. None of said plaintiffs proved any of their allegations in the complaint as amended.

The court further finds that the Independent Voters of Illinois and the Committee for an Effective City Council are each and both unincorporated, voluntary associations and that they do not allege, nor have they proved, that they have sustained or will sustain any substantive injury by virtue of the adoption of the Ordinance in question, but merely assert that they represent certain classes of individuals whose constitutional rights have been impaired.

The court concludes as a matter of law that the individual plaintiffs are not entitled to any relief herein for their failure to prove any injury to them or violation of their constitutional rights and, therefore, the defendants herein are entitled to a decree in their favor.

The court further concludes that as a matter of law constitutional rights under the first eight amendments to the Constitution of the United States and the Thirteenth, Fourteenth and Fifteenth Amendments are individual rights. Only an individual or individuals on behalf of a properly brought class action have any standing to bring suits in this court. The court, therefore, concludes that since the Independent Voters of Illinois and Committee for an Effective City Council have not charged or proved any substantive rights herein, they have no standing to be heard in this court and should be dismissed as party plaintiffs.

DECREE

This matter having been heard by the court, and the court having this day entered simultaneously herewith its Findings of Fact and Conclusions of Law herein, in accordance therewith

It is ordered, adjudged and decreed that:

1. The prayers of the plaintiffs for both a preliminary and a permanent injunction are hereby denied.

2. The allegations of a class action as set forth in the complaint as amended are hereby stricken and the complaint as a class action is dismissed for failure to maintain such allegations by any competent evidence.

3. The conspiracy allegations in the complaint as amended are stricken and dismissed for failure to support and maintain such allegations with any competent evidence.

4. The complaint as amended of plaintiffs Independent Voters of Illinois and Committee for an Effective City Council, both unincorporated and voluntary organizations, is stricken and dismissed for the failure of each and both to allege or prove any substantive injury as required by law and, further, to prove that they or either of them have any standing to bring a suit involving a constitutional question in this court.

5. The wards of the City of Chicago as created by the Ordinance enacted by the City of Chicago on November 5, 1970 are compact and contiguous.

6. Said Wards are not more irregular nor in any manner arranged in an unnatural distribution of population or gerrymanded to accommodate any racial, ethnical, economic or other group of people. The Ordinance creating said Wards is fair, reasonable, legal and constitutional.

7. Said Ordinance enacted by the City of Chicago on November 5, 1970, reapportioning the Wards of the City of Chicago, is not racially, nor ethnically, nor otherwise discriminatory, and it is not violative of the Fourteenth and Fifteenth

Amendment or any other Amendment or provision of the United States Constitution but is in every way constitutionally valid.

8. Defendants have judgment for their costs herein against the fourteen individual plaintiffs herein, jointly and severally, but not against the other plaintiffs who have no standing in this court and against whom no money judgment may be entered.

/s/ J. S. Perry,
Judge

Dated: Chicago, Illinois,
January 22, 1971.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 71-1077 September Term, 1970 January Session, 1971

Williams Cousins, Jr., A. A. Rayner, Jr., Leon M. Despres, William Singer, George Barr McCutcheon, Rev. Jesse L. Jackson, Rev. Richard A. Lawrence, Andrew Crout, Rosemary Gulley, Timuel D. Black, Jr., Graciano Lopez, Margaret B. Lurie, Susan Schwerin, Independent Voters of Illinois, and Committee For an Effective City Council,

Plaintiffs-Appellants,

Mary Lee Leahy,

Intervenor-Appellant,

v.

City Council of the City of Chicago, Richard J. Daley, individually and as Mayor of the City of Chicago, and Board of Election Commissioners of the City of Chicago,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 C 3202

Joseph Sam Perry, *Judge.*

FAIRCHILD, *Circuit Judge*. On November 6, 1970 the city council, Chicago's legislative body, enacted a redistricting ordinance dividing Chicago into fifty wards. The city council is composed of aldermen, one elected from each ward for a four year term. Aldermen were elected February 23, 1971, under the redistricting ordinance, and are now serving. Plaintiffs in this case challenge the validity of the ordinance on the grounds that it embodies racial and political gerrymandering in violation of federally protected rights and that the wards are not compact, as required by an Illinois statute, S.H.A. ch. 24, §21-36. The action was begun and decided in the district court, and an appeal taken, before the February 23, 1971 election.

I. *History of the litigation.*

Litigation seeking redistricting of Chicago began in 1966. Plaintiffs Sherman H. Skolnick and others challenged the districts as drawn in the 1961 ordinance for deviation from one person-one vote standards. In 1968 the district court found deviations in terms of the 1960 census to an impermissible degree, enjoined further general elections under the 1961 ordinance and required a new districting ordinance, based on 1970 census figures, to be enacted and filed by November, 1970. Except for one modification, advancing the deadline and no longer significant, this court affirmed.[1]

On November 14, 1970, after hearing, the district court held the November 6, 1970 ordinance constitutional.[2]

On appeal, this court affirmed, but limited our affirmance to rejection of the claim that the districts did not yet come close enough to exact equality of population. In an unreported order, entered December 14, 1970, we said:

> "We conclude that, considering the ordinance from the point of view of mathematical precision alone, the district court's decision that the ordinance fulfills the required

[1] *Skolnick* v. *Mayor and City Council of Chicago*, 415 F2d 1291 (7th Cir. 1969); cert. den. 397 U.S. 954.

[2] *Skolnick* v. *Mayor and City Council*, 319 FSupp. 1219 (N.D. Ill. 1970).

standards (*Reynolds* v. *Sims*, 377 U.S. 533, and *Kirkpatrick* v. *Preisler*, 394 U.S. 526), is to be affirmed.

"The appellants and the Chicago Bar Association assert that as late as the hearing date the district judge should have permitted the filing of an amended complaint and should have permitted several aldermen to realign themselves as plaintiffs and other Chicagoans to become plaintiffs. These parties claim in substance that notwithstanding the close approximation to precise equality of the wards presented by the ordinance, the ordinance is invalid by reason of alleged gerrymandering which could dilute the voting strength of racial, political and religious groupings of people. Although the district court on its own motion gave some thought to whether this might be true and concluded after examining offers of proof that there was 'no evidence' of racial and 'no substantial evidence' of political gerrymandering, it cannot be said that the claims of gerrymandering advanced by the appellants were fully litigated or decided on their merits.

"Since these claims were not fully litigated by the parties and since some parties appear to interpret the judgment as deciding them, we consider it appropriate to declare expressly in this order that consideration of the gerrymandering issue has not been foreclosed by the district court's judgment, which we now affirm, and that appellants or others are free to file a new action if they wish to pursue this issue."

On December 22, 1970 plaintiffs filed the complaint in the present case. The February 23 election was imminent, and the district court commendably expedited the case. Hearings began December 29, 1970 and continued, with necessary interruptions, through January 18, 1971. On January 22 the district court filed findings, conclusions, and judgment in favor of defendants. *Cousins* v. *City Council of City of Chicago*, 322 FSupp. 428 (N.D. Ill. 1971).

Plaintiffs appealed. We denied their motion to enjoin the election, noting among other things that "the election will not defeat or impair our appellate jurisdiction; should appellants

prevail, we would have power to order prompt redistricting and a new election; . . . indeed, it is manifest that the ward boundaries established by the ordinance under attack are to be preferred to the prior boundaries which would be preserved by an injunction."

II. *The complaint.*

The complaint alleges that the 1970 ward boundaries operate to dilute the votes and voting strength of important elements of the voting population of Chicago, specifically black voters, voters of Latin-American origin or ancestry, and independent voters; that such dilution was accomplished by drawing unnecessarily irregular ward boundaries and creating wards not compact; that boundaries were drawn as a gerrymander with intent to discriminate against black, Latin-American, and independent voters, and candidates whom they would support; that the wards are not composed of compact territory as required by state law. The gist of the claims as developed at trial and in argument is that the boundaries were drawn so as to minimize the number of wards in which the majority would be black, or would be so-called independent voters, and to avoid having any ward in which the majority would be Puerto Rican.

Thirteen plaintiffs are individuals, residents and voters within the city. Five were aldermen who voted against the 1970 districting ordinance. Seven are black and one Puerto Rican. At least ten are so-called independent voters. Party designations do not appear on the ballot, but party organizations often endorse candidates. Plaintiffs refer to independent voters as those who "have frequently voted for and actively supported independent candidates for public office, meaning candidates who are not the candidates of any political party."

Two plaintiffs are unincorporated associations: Independent Voters of Illinois, a statewide organization committed to the advancement of independent politics, including the support of independent candidates in Chicago, and Committee for an

Effective City Council, committed to the advancement of independent politics in relation to the city council of Chicago.

III. *The districting created by the ordinance.*

Printed as part of the opinion is an outline map of Chicago, showing ward boundaries according to the 1970 ordinance.

The total population of Chicago, shown by the 1970 census at the time the ordinance was enacted (later revised) was 3,329,090. Thus the goal was to draw wards each containing 1/50 of that number, or 66,582. The result very closely approached that goal.

The map shows that the shapes of wards are far from perfect geometric symmetry. Wards are required, by an Illinois statute, to "be composed of contiguous and compact territory."[3] In our view there are a number of reasons why perfect symmetry in outline can not be achieved or closely approached.

The eastern boundary of the city is, for the most part, the curving shore of Lake Michigan. The other boundaries have substantial irregularities. One north-south dimension is over 26 miles, and one east-west dimension in the central portion less than 7. Within the external boundaries are various natural and man-made barriers and substantial areas without resident population, such as Lake Calumet, rivers, expressways, parks, railroads, and concentrations of industry, all of which could have a bearing on whether a particular ward structure reasonably met the compact territory requirement. Census tracts, which were largely relied upon in the process of districting, vary considerably in area, shape, and number of residents.

In considering the plaintiffs' claim, founded on state law, that the wards are not compact, we look for guidance to the Supreme Court of Illinois. In dealing with a requirement that senatorial districts be formed of compact territory, it has said: "There is a vast difference between determining whether the

[3] 24 S.H.A. §21-36.

principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the legislature."[4] Notwithstanding the irregularities in outline of wards, we could not determine from the present record, if it were our place to do so, that the principle of compactness was not applied at all.

Nonetheless, it is our view that when other facts point to a probability that there has been invidious discrimination in drawing ward lines, deviations from maximum compactness may be considered along with these other facts in determining whether such discrimination (violating federal rights) has occurred.

At the time of trial, 1970 census figures on racial composition of census tracts were not available, and the evidence at trial tending to show where black people and people of Puerto Rican origin live and the percentage they constituted in various wards was testimony of witnesses, based on various studies. On appeal, we have permitted the parties to file copies of "Racial Composition of Census Tracts, 1970 Census Data" and computations therefrom showing the percentage of the population of each ward which is negro. Using these figures (which to a considerable degree substantiate the estimates made at trial) the following propositions appear:

There are 15 wards in which a majority of the residents are negro.

There are 13 of those wards in each of which more than 75% of the residents are negro. These wards are in two areas of the city. The 2d ward (91.9% negro) is just south of the downtown business "Loop" area and the 3d (99.0%), 4th (91.1%), 16th (95.3%), 20th (97.4%),17th (97.6%), 6th (97.3%), 8th (77.8%), and 21st (86.4%) string out toward the south. The 27th ward

[4] *People* v. *Thompson*, 155 Ill. 45, 40 NE 307, 315 (1895).

(89.8%) is just northwest of the "Loop" and the 28th (83.5%), 29th (88.6%), and 24th (98.6%) are west and southwest of the 27th.

The eleven wards bordering the south side group have the following percentages of negroes: 1st, which also borders the west side group (35.8%); 5th (57.5%); 7th (26.9%); 10th (9.2%); 9th (28.3%); 34th (66.3%); 19th (2.2%); 18th (28.2%); 15th (8.3%); 14th (6.2%); and 11th (11.3%).

The six wards (other than the 1st) bordering the west side group have the following percentages of negroes: 42d (39.2%); 26th (4.7%); 31st (1.4%); 37th (12.5%); 22d (23.4%); and 25th (36.3%).

The largest percentage of negroes for any of the other 20 wards is 5.3%.

Plaintiffs contend that if the lines had been drawn with indifference to the color of the residents, there would have been more wards with a majority of black people.

Testimony at trial tended to show that there are about 80,000 city residents of Puerto Rican origin, most of whom live in the 26th, 31st, and 33rd wards. As the wards were drawn the Puerto Ricans are a substantial minority in each (40-45% in the 26th, 30-35% in the 31st, and 25-30% in the 33rd). The claim is that had the wards been drawn differently, Puerto Ricans might have had a majority in one or possibly two.

Plaintiffs produced evidence which they claim tended to show that the voters they refer to as independent live in certain areas and that the ward lines might have been drawn so as to give them a majority in more wards.

IV. *The drawing of the 1970 ward map.*

Alderman Thomas E. Keane was chairman of a subcommittee of the Council's Committee on Committees and Rules. The subcommittee conducted public hearings from October 13 to November 4, 1970, with Alderman Keane presiding. On

November 5 the full committee adopted the ward map reported by the subcommittee, and on November 6 the council enacted the districting in the form of an ordinance.

At the public proceeding before the subcommittee, Alderman Keane worked from a city map showing census tracts. In selecting territory for a ward, he would announce the number of a census tract. Then its population would be announced. Clerks kept a running total for that ward until it reached approximately the ideal one-fiftieth of the city's population. Adjustments were made from time to time, either by shifting census tracts between wards or by dividing them and assigning constituent enumeration districts to different wards. Defendants contend that selection of areas for inclusion in any ward was motivated only by considerations of contiguity, compactness, and obtaining a total population for each ward as close as possible to the ideal.

Plaintiffs discovered during the trial, and produced proof, that an earlier and confidential version of a proposed ward map had been prepared in the latter half of September with Alderman Keane's knowledge and approval. Census figures first became available September 10, though subjected to recalculation from time to time thereafter. The earlier map was prepared in the library of Alderman Keane's law office, across the street from the city hall, by city employee Edwin Bell and three university student interns who were paid by the city for this particular project. Although the district court found that preparation of this map was "an academic exercise," we consider the finding clearly erroneous, and that such preparation was at least a trial run for the process later conducted at public hearings. It is important because certain conversations in the course of its preparation showed that race was at least thought about in connection with particular ward lines. A lack of candor concerning the existence and purpose of the Bell-student map detracts nothing from the weight of such evidence.

Mr. Bell was deputy chief administrative officer for the Council Committee on Finance, of which Alderman Keane was chairman. Bell was also a lecturer at the University of Illinois Circle Campus. During the spring of 1970, Mr. Bell and Professor Murray of the same university, with the approval of Alderman Keane, had planned a City Council Urban Intern Program, to begin in the fall term, 1970. Three students were selected. On June 29, Alderman Keane had written to the chairman of the department of political science about "the possible appointment of one or more graduate students as legislative interns attached to the Committee on Finance.

"I would be pleased to have one or more of your students perform as interns under the direction of Mr. Bell and Dr. Murray. It is understood that these students will perform those research projects and other tasks which are assigned to them by members of my staff."

In early September, 1970, the remapping subcommittee, of which Alderman Keane was chairman, was appointed. At that time the court-imposed deadline for enactment of a redistricting ordinance was October 1. Although census figures had been expected by August 1, they were not yet available, but became so (though subject to further revision) September 10. About September 8, after obtaining the approval of Alderman Keane, Bell contacted Murray, and talked again on the 11th. Bell told Murray that the city was engaged in a problem of redistricting, had to get the project finished under a certain time pressure, and that this would be a good project to introduce the students to the internship program. Murray telephoned or telegraphed the students and told them to report to Bell. They worked from about September 17 to about October 1.

The work was done in the library of the law office of Alderman Keane, Alderman Wigoda, and their associates. Alderman Keane was in and out and conversed with or in the presence of the student interns. The procedure was similar to that which Alderman Keane later followed in the public

hearings, with Bell selecting census tracts for inclusion in a ward, and the student interns performing the clerical tasks of tallying and adding.

Mr. Taylor, one of the student interns, testified that Alderman Keane as well as Mr. Bell told them about the importance of redrawing the map, the opportunity they would have to learn something, and that they should not say anything to anybody else; that Bell said that Alderman Wigoda wanted to get rid of certain areas in his ward, but after the lines were drawn the alderman pointed out that they had also cut out one of his favorite precincts, and they restored it; that a committeeman in another ward had sent in notes as to how he wanted his ward drawn; that they worked on the wards around the rim and then inwardly but there were two which were drawn ahead of their turn, Alderman Keane's 31st, and Mayor Daley's 11th.

Another student intern, Mr. Kazemek, testified that Bell told them they would be involved in drawing a new ward map for the city; that on one occasion Alderman Keane remarked that "if Alderman Despres were left out of his ward with the redrawing he would scream and holler;" that at the same time Alderman Keane said that regardless of what the map looks like everyone would accuse him of gerrymandering; that at one time Alderman Keane pointed to his own 31st ward and said "That's the key;" that another alderman came in, looked at his ward, and talked to Mr. Bell about it; that Bell told the student interns, "we're trying to have it finished by October 1."

Mrs. Eme, the third student intern testified that they were instructed to make the wards as compact as possible and to try to keep all aldermen and committeemen in their wards; that they had lists of addresses of both (which were produced in court); that one day they noticed they had left Alderman Despres out of his ward and Bell redrew the line; that later when Alderman Keane came in he was told of this and laughed and made the remark about a lot of hollering; that Alderman Keane had looked at his own ward; that Alderman Wigoda

commented about their leaving out one of his good precincts.

The student interns received regular stipends from the university during the academic year and worked on other internship projects after October 1st. The city also paid them for the time they worked on the map, but not for their other work.

The census office changed the figures on several occasions while Bell and the student interns were working, and the breakdown into enumeration districts (census units smaller than tracts) never became available to them.

On September 25, 1970, the city applied to the district court in the *Skolnick* case for an extension of the deadline to November 10, pointing out that there were still discrepancies in tract figures requiring recalculation and that enumeration district figures would be required in order to divide tracts. On October 2, the extension was granted. Alderman Despres petitioned this court for a writ of mandamus, which was denied. In the petition filed October 6, it was presciently suggested that the city must already have prepared a reapportionment plan. The city's response was that the suggestion was made of "evanescent stuff."

It is true that the Bell-student map did not reach the mathematical precision later reached by the ordinance, but Bell and the student interns worked with such figures as were available at the time, and while the October 1 deadline was still in force.

Alderman Keane never testified concerning the Bell-student map. Plaintiffs took his deposition for discovery purposes before they knew about it. Although he was emphatic that the map he used at the public hearings was the only map he used, he did not volunteer the facts about the Bell-student map in answers where such disclosure would have been appropriate. His deposition, though taken for discovery, was offered by defendants and received over plaintiffs' objection. He was not called to testify at trial.

Defendants called Mr. Bell, who corroborated much of the student interns' testimony. He testified, however, that the project was an academic project and that Alderman Keane's comments when he saw the work were "Grandfatherly." He testified "The value to be gained [by the students] from the ward map that they drew would come out in terms of the changes in population, in terms of numbers, in terms of the shift in populations. They would see what the configuration of the city looked like."

He also testified that the student interns performed a clerical function, and therefore the project was a failure as an academic program. He explained, "When I devised the project, the project, of course, was to be a total involvement project on the part of the interns and myself, and I was to serve as a gatekeeper, more or less, in the performance of the redistribution of the wards. What it ended up with was very close to something that I think most fathers are familiar with when they buy their children a railroad train. They set it up in the livingroom, and they never give the transformer, but they let the kids stand by and watch while the train runs around the track."

Professor Murray testified that he had seen Mr. Bell on January 6 shortly after defendants learned that plaintiffs were in touch with or had subpoenaed the students. Mr. Bell "appeared to be quite shaken." With respect to the character of the map as an academic project, "Mr. Bell, to the best of my recollection, stated that that would be a difficult position to take. I am not sure whether he used the word 'difficult' or not, but Mr. Bell suggested that he would not be able to take that position."

The district court believed Bell, notwithstanding the impeachment by Murray's testimony, and made a finding, which appears between paragraphs numbered 37 and 38, to the effect that the Bell-student map was an academic exercise. With all

respect, and due regard to the opportunity of the trial court to judge credibility, we deem the finding clearly erroneous.

We think it clear from all the circumstances that the project on which Bell and the interns were engaged had a serious and substantial purpose for the benefit of the city. The October 1 deadline was approaching, and until it was extended, no one could know whether and for how long it would be extended. It would only make good sense to have on hand a map produced with the best figures available. In the public hearings when Alderman Keane began the process of selecting census tracts for inclusion in particular wards, he did not completely follow the Bell-student map, but did often appear to make similar choices. He proceeded with reasonable assurance that the method he was following would produce a result, and it seems doubtful that he could have had such assurance without preliminary work. At the very least, the Bell-student project was a trial run for the task later performed at the public hearings.

V. *The findings and evidence with respect to considerations of race.*

The crucial findings of the district court with respect to claims of racial gerrymandering are contained in paragraphs numbered 19, that census data were the sole basis for shaping of wards; 30, that the determination was not based on information of racial or ethnic distribution; 32, that there is no evidence that the council intended to dilute the vote of black people or other ethnic groups; and 33, that the 1970 ward map did not have the effect of such dilution.

Since these findings dispose of claims of infringement of fundamental constitutional rights, though not infringement directly of first amendment rights, we think our duty on appeal

is to subject the findings to specially close scrutiny.[5] As will be stated in more detail, we think there is substantial evidence tending to show that Alderman Keane considered the race of residents at least with respect to particular lines and areas, and, since he directed the drawing of the map and made the choices of territory, it seems fair to impute his consideration to the council in its enactment of the ordinance. Although we are not prepared to measure, on this record, any discriminatory effect which may have resulted, we think that the findings must be set aside until the question has been more fully explored in the district court.

We summarize in the following paragraphs the evidence offered to show that race was considered in drawing the map:

Conversations concerning the 7th ward.

The new 7th ward has 26.9% black residents, according to the census figures filed in this court. It lies between Lake Michigan and the 8th ward, which has 77.8% black residents.

The former 7th ward, under the 1961 ordinance, extended somewhat farther north and not as far south, and was believed to have between 55 and 60% black residents. It was served by Alderman Bohling, who is white. Mr. Taylor testified that "Mr. Bell wanted to be able to keep Alderman Bohling in the 7th ward."

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[5] Cf. Independent review of record in first amendment cases involving review by the Supreme Court of state court adjudications, *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963), *Cox* v. *Louisiana*, 379 U.S. 536 (1965), *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 285 (1964), *Bachellar* v. *Maryland*, 397 U.S. 564, 566, (1970), *Greenbelt Publishers Association* v. *Bressler*, 398 U.S. 6, 11 (1970). See also, instances of special scrutiny of district court findings by courts of appeals, *Guzich* v. *Drebus*, 431 F2d 594, 599 (6th Cir. 1970), cert. den. 401 U.S. 948 ("questions of constitutional magnitude"); *United States* v. *Baker*, 364 U.S. 107, (3rd Cir. 1966), ("constitutional rights"); *Caldwell* v. *Craighead*, 432 F2d 213, 224 dissenting opinion (6th Cir. 1970) cert. den. 402 U.S. 953 ("First and Fourteenth Amendment issues").

The Bell-student map contained a 7th ward which would, according to census figures, have 29.4% black residents. At the subcommittee hearings, the ward was re-drawn several times. At one stage Tract 4603, which has a population of 8,885, 93.3% white, was included in the 8th ward, represented by Alderman Cousins, a plaintiff here, who is black. Alderman Keane shifted Tract 4603 into the 7th ward, offsetting that by a shift of predominantly black tracts from the 7th to the 8th, remarking to Alderman Cousins about Tract 4603, "I understand they have a lot of Polish voters over here, and you don't want to represent them". Alderman Keane testified he did not recall this statement.

It must be said that putting Tract 4603 into the 7th ward, tended to make that ward more compact. If the statement was made, however, it indicated at least awareness of the racial composition of the area being transferred, although we do not suggest that proof of awareness alone would establish invidious discrimination.

Conversation about the 31st ward.

The 31st ward is represented by Alderman Keane. Its present population is 1.4% black, according to census figures, and 30-35% Puerto Rican according to testimony at trial. The present (1970) north and south boundaries are the same as on the 1961 map, except in length and except for an irregular boundary near the east end of the south boundary. Tracts 2306 and 2313, now included at the west end were not part of the ward on the 1961 map, and Tract 2425 and part of 2426 are not now included although they were part of the southeast corner of the ward on the 1961 map. Puerto Ricans live in the eastern portion of the ward, in the portion eliminated in 1970, and to the north, east, and south of the east end of the ward. Adding territory to the west of the 1961 ward resulted in a lower percentage of Puerto Ricans than if territory to the east had been added.

Taylor testified that at one point while the 31st ward was being drawn, "I had suggested a tract that would have brought the figure up to the required number, and Mr. Bell said that we couldn't include those tracts on the east side of the ward, because that area had changed and was now black and Puerto Rican, I think he said." Kazemek testified that there was some discussion about moving the 31st ward west; he thought it was Mr. Bell who made reference to it.

Conversations about the 14th and 16th wards.

Alderman Burke represented the 14th ward and Alderman Sheridan the 16th. Both aldermen are white. There was virtually undisputed testimony that Alderman Keane said something to Bell and the student interns to the effect that it was important to draw ward boundaries so that these two could be reelected. Although there was a conflict whether he mentioned race, the circumstances make it appear probable that race was the consideration Alderman Keane had in mind. As drawn by Bell, apparently after the conversation, the 16th ward, as well as the 14th, would probably have been majority white. It must be noted, however, that as ultimately drawn, the 16th ward is 95.3% black. The 14th is 6.2% black.

Mr. Taylor testified that Alderman Keane mentioned these wards and said, "The way you have it drawn isn't any good. We have to save those two young guys. They can't run in those wards. Those wards are all black and there is nowhere for them to live. These are young people. The City Council needs young people. A lot of us are getting old. These are bright people with college degrees, and they have a lot to contribute to the city." Taylor testified, "So he said that we should change that area if we could so that there would be some way for them to run in those wards."

Mr. Bell testified that Alderman Keane said, "You can't do that. You're taking two young and bright aldermen, and you are taking them out of the Council. They have bright political

futures;" that Alderman Keane did not say anything about the black population in those two wards.

Mr. Kazemek testified, "We were working on an area of the city—I can't even recall which area but Alderman Keane pointed to that area and he made the statement that 'You can't do that to those two aldermen.' I recall the name Sheridan being mentioned. He said, 'You can't do that to them.' He said, 'They are bright and educated young people and we need that kind of person in the City Council." Mr. Kazemek did not recall that Alderman Keane said anything about the racial composition of the wards.

Mrs. Eme testified, " . . . I recall Mr. Sheridan's name being mentioned, Mr. Keane mentioned it, Mr. Keane coming in and saying that it would be difficult for him to be reelected in that ward that we drew, and then he proceeded to say, which makes me think that another man was mentioned, that they were two young men, with college educations, and the City Council was in need of fine men like that."

The district court announced orally several findings (not reflected in 322 FSupp 428) about this conversation. In certain respects these findings recited matters of record, already pointed out. In other respects, they are wholly inconsistent with the record and need ot be treated here.

The 18th ward.

The present 18th ward (1970) is one mile wide, north to south, throughout almost all its length. It is approximately 5 miles long, east to west, except for irregular boundaries in its northeast and southeast corners. 28.2% of its residents are black. The areas in which black people are concentrated are in the eastern end. If the ward were drawn so as to extend farther north from its southern boundary and not so far east from its western boundary, it would be more compact, would have fewer black residents, and those left out would be joined with some other ward. The shape of the 18th ward as drawn suggests

that it may have been an instrument in cutting into the area predominantly inhabited by black people so as to absorb them into a ward in which they would be a minority instead of including them in another ward in which they might be part of a majority of black residents.

At the trial a witness demonstrated the possibility of dividing the area now covered by wards 12, 13, 14, 15, 16, 17 and 18 into a different set of wards of equal population. In such redraft, at least wards 15 and 18 more closely approximate a square.

The statistical experts.

One of the witnesses called by plaintiffs was Dr. Philip M. Hauser, director of the Population Research Center of the University of Chicago. He has had many years of experience with the United States census, including being acting director for the 1950 census and chairman of the advisory committee for the 1960 and 1970 census. He also has represented the United States on the Population Commission of the United Nations.

Dr. Hauser testified, in answer to the question whether racial or ethnic considerations were taken into account in the drawing of the new ward map ". . . it is perfectly clear to me that the ward lines are drawn in such a way as to concentrate Negro population within wards and as to have majority white population where Negro populations are subsumed. . . ." He indicated several examples, including ward 18.

Dr. Hauser also testified, "It is my judgment, based on well established mathematical probability theory, that if race were not taken into consideration, or ethnicity in the case of Puerto Ricans, that all ward lines which crossed well-known boundary lines or between blacks and whites and Puerto Ricans, and the remainder of the population, would have an equal probability of one or the other being a minority group." He said that the number of wards crossing the dividing lines in which black

people or Puerto Ricans are the minority is "far above the level that probability expectations would indicate, or another way of saying that, it is perfectly clear to me that the ward lines on that map could not possibly have been drawn by anyone who was color blind."

Dr. Paul Meier, acting chairman of the department of statistics at the University of Chicago, accepting the assumption that if race or ethnic origin were not taken into consideration in drawing the lines it is equally probable that a ward crossing the racial boundary would have a black as a white majority, computed that if 14 wards crossed the boundary the probability that 12 would have white majorities and 2 white minorities is only 1 in 150.

With all respect, we point out that the theory of probability may have less significance for our present purposes to the extent that Alderman Keane's freedom of choice may have been limited by the varying shape and sizes of census tracts, and the desire, without invidious intent, to break as few tracts as possible into enumeration districts. We are, in short, at a point where a demonstration that the wards could, with the census figures at hand, have been drawn with similar equality of population, and no less compactness, but into more wards having a black or Puerto Rican majority would be more persuasive than an opinion that if wards had been drawn with indifference to race a greater number of black or Puerto Rican majority wards would have been more probable.

History and general background.

One of plaintiffs' witnesses was Mr. Donald Rose, director of research and communications for the National Catholic Conference for Inter-Racial Justice. He described studies he had made tending to show that as the black population of Chicago increased, the redistricting ordinances in 1931, 1947 and 1961 had changed ward boundaries in a manner corresponding to the growth of areas in which the residents were predominantly

black, so as to keep at a high figure the number of wards in which the majority of residents were white.

Alderman Despres testified: "I think what you don't understand, Mr. Neal, is that every alderman in the city of Chicago is acutely interested and aware of the racial composition of the city. There is no subject that preoccupies the City Council and the aldermen of Chicago more insistently than that subject. Every alderman has a great deal of information about where the black persons in Chicago live and where the white persons live. . . . It is a subject which preoccupies aldermen almost pathologically."

Alderman Hoellen testified to a conversation in October 1970 with Alderman Wigoda, who Hoellen considered "has always been my rather vocal foe at City Hall." The latter indicated that the council "would be inundated with new Negro aldermen, come the remapping of 1970," and said to Hoellen, "Suddenly, we have much in common."

For an example of a public issue in Chicago which turns on racial residence patterns, see *Gautreaux* v. *Chicago Housing Authority* 296 FSupp. 907 (N.D.Ill. 1969), 304 FSupp. 736 (N.D.Ill. 1969), 436 F2d 306 (7th Cir. 1970).

The testimony just cited with respect to history and background at least suggests that claims that 1970 ward lines were chosen for the purpose of minimizing the voting strength of black people must not be found meritless without careful scrutiny.

VI. *Conclusion with respect to claims of racial and ethnic gerrymandering.*

Given the proposition that the city council is to be made up of aldermen, one elected by each ward, it follows that every resident has a right that the wards be equal (as nearly as feasible), so that the alderman who represents him represents the same number of residents (as nearly as feasible) as every

other alderman, and that at least in mathematical terms each resident has representation in the same ratio as every other resident of the city. As decided in the *Skolnick* case, the 1970 ward map fulfilled this right in terms of the census figures known at the time of enactment.

Wards of unequal size, and resulting unequal representation, are one facet of invidious discrimination from which the 14th amendment protects such resident. But there may be other facets, as claimed here. Even though quantitative equality be preserved, members of a racial or ethnic group are protected, in our opinion, from having ward lines drawn for the purpose of diluting or minimizing the voting power of such group. We by no means assume that such group will always vote as a block, but to the extent its members choose to do so, they are to be protected from purposeful maneuvers to deprive them of effectiveness.

Gomillion v. *Lightfoot*[6] held that "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." That case involved the creation of municipal boundaries and black people were the butt of the discrimination. Although *Gomillion* was grounded on the 15th amendment, which prohibits abridgement of the right to vote on account of race, it was decided two years before *Baker* v. *Carr*[7] opened up the courts to claims that malapportionment of legislatures denied equal protection under the 14th amendment. Recently, the Supreme Court has cited *Gomillion* as an example of "no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights."[8]

Persons who may correctly be referred to as Puerto Rican (or Mexican, or Latin American, or Spanish speaking Americans) are not a distinct race, as anthropologists define the term, although some of the common usages of the term would

[6] 364 U.S. 339, 346 (1960).

[7] 369 U.S. 186 (1962).

[8] *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971).

apply.[9] We do not deem it necessary to examine whether the 15th amendment, which forbids denial or abridgement of the right to vote on account of "race" is properly to be construed as protecting ethnic as well as racial groups from the sort of invidious dilution of voting power charged here. We are satisfied that the equal protection clause of the 14th amendment provides such protection in any event.

We note that although the challenges raised in behalf of black and Puerto Rican citizens in *Wright* v. *Rockefeller*[10] were unsuccessful because of failure of proof, there is nothing in the opinions to suggest that the presence of Puerto Ricans among those allegedly discriminated against detracted from plaintiffs' case. On page 58, for example, the Court said, "We accept the District Court's finding that appellants have not shown that the challenged part of the New York Act was the product of a state contrivance to segregate on the basis of race or place of origin. That finding was crucial to appellants' case as they presented it, and for that reason this challenge cannot be sustained."

Whitcomb v. *Chavis*[11] involved a claim that the vote of black persons and poor persons was invidiously diluted. Again the challenge failed for want of proof, but the language chosen by the Court implies, it seems to us, that this type of challenge need not be based on race in order to be successful: "But there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were con-

[9] See definition of the noun "race", and synonyms, Webster's Third New International Dictionary.

[10] 376 U.S. 52 (1964).

[11] *Supra*, fn. 8.

ceived or operated as purposeful devices to further racial or economic discrimination."[12]

We take judicial notice that according to revised census figures Chicago has a population of 3,366,957, of whom 1,102,620 or 32.7%, are black. The 15 wards in which (according to census figures) a majority of the residents are black elect 30% of the city's aldermen. 16 wards would elect 32%, 17 wards 34%. Any comparison of the percentage of residents who are black with the percentage of the council to be elected by wards containing a black majority has significance only because of residential patterns in which black residents are concentrated in large, well defined areas. A minority group completely and equally dispersed throughout the city could not be in the majority in any ward. Given a minority as substantial as 32-33%,[13] residential segregation, and division into 50 equal wards, the number of majority black wards is necessarily substantial, although the exact number may vary for a number of reasons even if purposeful discrimination is not a factor. There is no principle which requires a minority racial or ethnic group to have any particular voting strength reflected in the

[12] P. 149. If *Whitcomb* has any guidance for us on the fundamental problem in this case, it is that plaintiffs, in order to be successful, must show that in drawing ward lines, choices were made with the purpose of diluting the voting strength of a particular racial or ethnic group, should they desire to exercise it as a group.

[13] 1970 census figures on the number of negro residents were not available at the time of trial, and it was pretty clear that the 1960 census figures on that subject were not meaningful. Plaintiffs produced testimony tending to show that the actual 1970 percentage for Chicago was 38 to 40%, and that for various reasons the census tends to count fewer black persons than are actually present. We have relied on the census figures on race which have become available while the appeal was pending, and conclude that in further proceedings they should control so far as they are material. In reapportionment litigation, and where the equality of size of districts is the issue, we think that most recent official census figures are not to be impeached. In litigation like the present we think that where the census purports to state an accurate figure on race or similar grouping essential to the claims, the census figures should not be impeached except by extraordinarily compelling proof that other figures are more accurate.

council. The principle is that such strength must not be purposefully minimized on account of their race or ethnic origin.

Plaintiffs clearly established, in our opinion, that the location of predominantly black and Puerto Rican areas was considered as Alderman Keane prepared to formulate the new ward boundaries. There is evidence from which it could be inferred that the contours of the 31st ward were chosen for the purpose of avoiding the presence of Puerto Rican residents, that those of the 18th ward were chosen for the purpose of putting black people in a minority in that ward in place of joining those people with other black people in a possible majority status in another ward, and, perhaps less readily, that the location and contours of the 14th were chosen so that black people would be an insubstantial minority therein. There is also opinion evidence that the ward lines were discriminatory, and evidence that for many years successive ward maps had been devised so as to maximize the number of white majority wards.

It does appear that the 1970 map produced 15 majority black wards (14 of which elected black aldermen in 1971) whereas the previous council contained only ten black aldermen. It must be said that the transcript of proceedings before the subcommittee during which Alderman Keane assembled census tracts into wards does not on its face suggest anything other than an attempt to create wards with equal population and at least some degree of compactness. One of plaintiffs' experts, Mr. De Vise, although of the opinion "that race was a factor in the delineation of wards," went on to say that "I do not think that race was a major consideration. I think that the major consideration was probably the retention of the old wards."

Plaintiffs did not produce other persuasive circumstantial proof that the ward boundaries were the product of purposeful discrimination, such as demonstration that one or more maps could be drawn, using the data available to the city in October,

1970, achieving population equality, and at least a similar degree of compactness, which would produce more than 15 wards with a clear majority of residents of one or the other or both the black and Puerto Rican groups. Defendants, on the other hand offered no proof that this could not be done.

Although we are convinced that the district court took a clearly erroneous view of the Bell-student map project, and thus failed to consider important elements of plaintiffs' case, we are unable to say that plaintiffs' evidence so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court so to find. If the litigation concerned ordinary interests of the plaintiffs alone, we might well conclude that they must bear the burden of failure to establish more clearly all elements of their case. We are of the opinion, however, that the type of rights involved here requires special care that claims of impairment be thoroughly inquired into.

It might, indeed, be argued that plaintiffs have shown enough so that the matter could be resolved by returning the matter to the district court for the limited purpose of a demonstration whether or not, following an objective standard, rationally related to redistricting and indifferent to race and ethnicity (such as, perhaps, reaching "the nearest practical approximation to perfect compactness")[14] and achieving population equality, a remapping would produce more than 15 wards with a clear majority of residents of one or the other or both the black and Puerto Rican groups.

We conclude, however, that the proper and just result, is a new trial of the issues. Should plaintiffs succeed, and a new partial or complete ward map be decreed, jurisdiction has been preserved so that the district court could order an election for aldermen from the wards affected, to serve for the balance of the current four year term, and declare such seats on the existing council vacant promptly after said election.

[14] *People* v. *Thompson*, *supra*, fn. 4.

If plaintiffs are unable to succeed on retrial, defendants will be entitled to judgment in this action. We do feel called upon to observe, however, that considerable revisions in census figures have been announced since enactment of the 1970 ordinance and since the election for the current term in February 1971, and it has been suggested that the revised figures produce a substantial disparity in population among the wards. We note that the decree in *Skolnick* requires that the 1970 ordinance shall govern all elections until after the 1980 census.[15] Under the terms of our affirmance of *Skolnick*, earlier referred to, such provision must necessarily yield to a decree in this action if plaintiffs are successful upon remand. We also observe that if the changes in census data show sufficient disparities among wards that the 1970 map could no longer be sustained under one person-one vote constitutional principles, the decree must yield to those principles and the council would have the duty of drawing a new ward map for the purpose of the election in 1975.

VII. *Consideration of political factors in drawing ward lines.*

Plaintiffs produced evidence that one motivation in drawing the ward lines was to keep each incumbent alderman and the incumbent ward committeemen within a ward which approximated his ward according to the 1961 map and to avoid pitting one incumbent against another in any new ward.

They also produced evidence tending to show that in Chicago there are certain areas where so-called independent voters are concentrated, and that the 1970 remap involved intentional concentration of such voters in two wards for the purpose of minimizing the number of aldermen such votes might elect.

The groups which are the butt of the discrimination claimed by plaintiffs are somewhat amorphous: in the first instance they are the persons who might want to support a non-incumbent

[15] 319 FSupp. at 1230.

candidate and persons who might be such candidates; in the second instance, persons who habitually are less likely than others to favor party endorsed candidates and more likely to favor candidates who are not endorsed. We are of the opinion that disfavoring of such groups by those who are drawing the districts, even if identification and community of political faith were proved with much greater definiteness than here, remains among the non-justiciable political questions.

The only expression by the Supreme Court cited by plaintiffs in support of this branch of their case is a reference in *Fortson* v. *Dorsey*[16] to minimizing or cancelling out the voting strength of "racial or political elements of the voting population" in dealing with possible invidious discrimination in creating multi-member districts. Any force in the reference, however, is offset by the Court's affirmance of a decision that political gerrymandering does "not raise questions under the Federal Constitution."[17] Mr. Justice Harlan, concurring, concluded that the court was affirming the district court's ruling rejecting any federal constitutional attack on partisan gerrymandering.[18]

Additionally, lower courts which have considered allegations of political gerrymandering have uniformly rejected the justiciability of such claims. See *Sims* v. *Baggett*, 247 FSupp. 96, 104 (M.D. Ala. 1965); *Sincock* v. *Gately*, 262 FSupp, 739,833 (D.Del. 1967); *Meeks* v. *Martin*, 251 FSupp. 484, 510, 513 (S.D. Tex. 1966); *Kilgarlin* v. *Martin*, 252 FSupp. 404, 432 (S.D. Tex. 1966); r'vd. on other grounds, *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967). In particular we note the excellent discussion by Judge Cannella, concurring in *Wells* v. *Rockefeller*, 311 FSupp. 48, 54 (S.D.N.Y. 1970), aff'd 398 U.S. 901 (1970).

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[16] 379 U.S. 433, 439 (1965), quoted in *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966).

[17] *WMCA* v. *Lomenzo*, 238 FSupp. 916, 925 (S.D.N.Y. 1965), aff'd per curiam, 382 U.S. 4 (1965).

[18] 382 U.S. at p. 6.

Plaintiffs have not persuaded us that these lower court cases were wrongly decided, nor demonstrated that their present claim meets the criteria of justiciable question as set forth in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

VIII. *Standing to sue.*

The district court found that no plaintiff claimed an injury or impairment of an individual right, and hence had no standing to sue. The basis noted by the court was that the plaintiffs who testified were not dissatisfied with their own wards. We think, however, that the interest involved in the racial or ethnic gerrymandering claim is not limited to one's interest as a voter in a ward, but includes the interest of a black or Puerto Rican plaintiff as a resident of the city that the voting strength of his group is not diminished by invidious discrimination. Such interest is impaired, if plaintiffs' assertions have merit, even though the particular plaintiff is in a ward where his group is in the majority.

Although reapportionment litigation necessarily affects the interests of a large class, and actions to compel reapportionment are customarily brought as class actions, we think the class action device is not essential. The court's proper concern is whether there are before it parties alleging "such a 'personal stake in the outcome of the controversy,' *Baker* v. *Carr* 369 U.S. 186, 204, as to insure that 'the dispute sought to be adjudicated will be presented in an adversary context and is a form historically viewed as capable of judicial resolution.' *Flast* v. *Cohen*, 392 U.S. 83, 101."[19]

We conclude that plaintiffs here who allege they are black or Puerto Rican and therefore among the group whose voting strength is allegedly purposefully diluted have such standing.

The district court found that the action could not be brought as a class action because plaintiffs had failed to establish the existence as classes of all black voters of the city and all voters

[19] *Sierra Club* v. *Morton*, ... *U.S.* . . . ., *No. 70-34, April, 19, 1972.*

of Puerto Rican or other Latin American ancestry. The finding was apparently based on the fact that there are black residents of Chicago, perhaps many in number, who favor the remap ordinance, and plaintiffs clearly do not represent them. It would be fanciful to suppose there were not a large number of black persons and Puerto Ricans who agreed with plaintiffs. There is authority that in similar situations, the fact that some members of an alleged class are opposed to the claim is irrelevant.[20] But in any event, we think plaintiffs have sufficient standing as individual members of the groups allegedly discriminated against.

IX Use of Depositions.

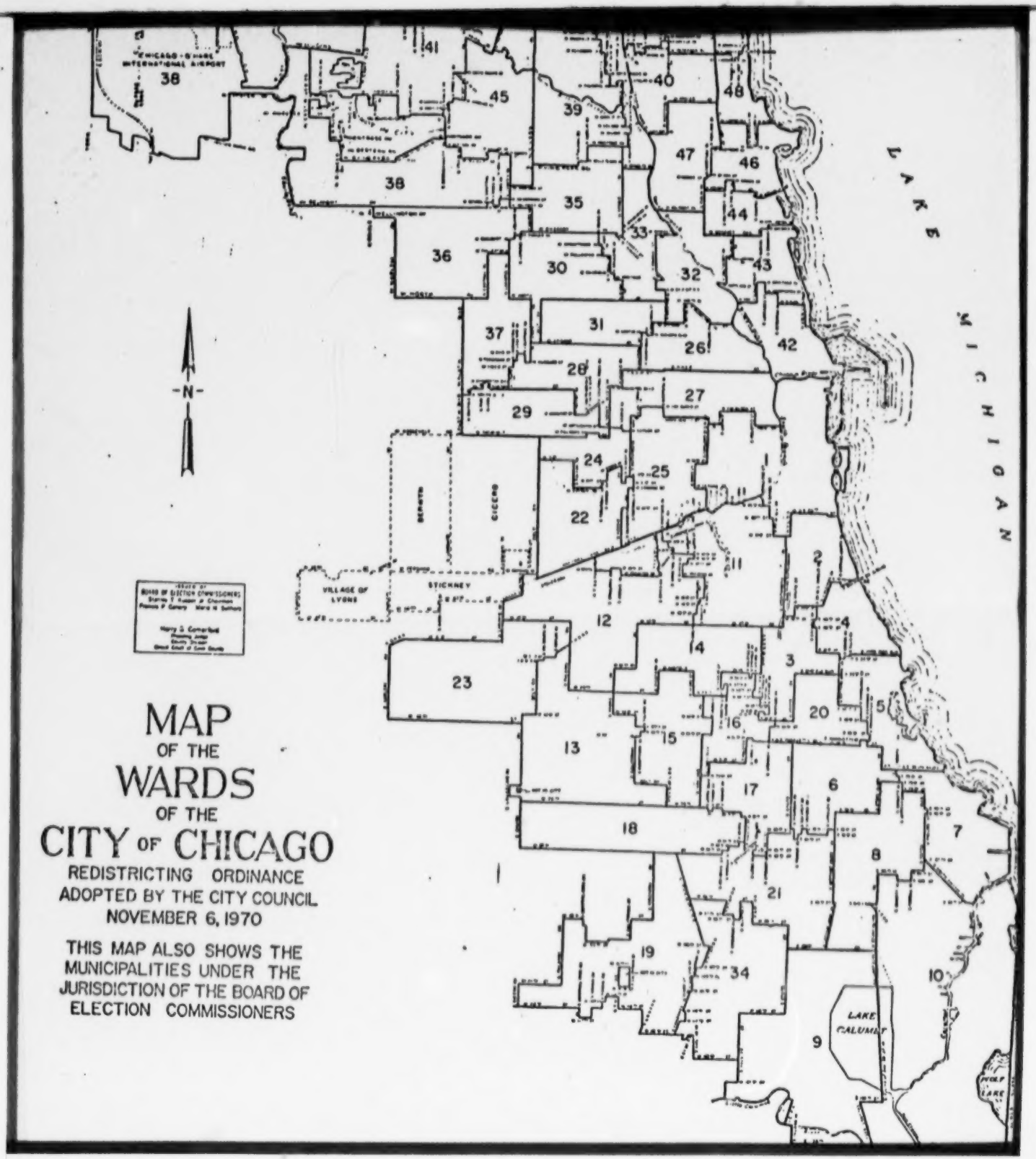
Prior to trial, plaintiffs, with leave of court, took the depositions of Alderman Keane and several others. Because of the exigencies of time the district judge had the depositions taken before himself. There were colloquies supporting the thought that the depositions were taken for purposes of discovery. After plaintiffs rested at trial, defendants offered the depositions of Alderman Keane and several others. Plaintiffs objected, but the court received them.

Under the circumstances, defendants could use these depositions, under Rule 32(a) (3), F.R.C.P. only if the court found, under (E) "that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." In the light of our disposition of the case, we need not decide whether the depositions were properly admitted under (E). If the exigencies of time, and the other attendant circumstances fulfilled (E), these considerations will not prevail at retrial.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion. Under Rule 23 of the local appellate rules of this court, adopted April 4, 1972, retrial

[20] *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F2d 920, 37.

will be had before a judge other than the judge who originally heard it, unless all parties request that the same judge retry the case.



MAP
OF THE
WARDS
OF THE
CITY OF CHICAGO

REDISTRICTING ORDINANCE
ADOPTED BY THE CITY COUNCIL
NOVEMBER 6, 1970

THIS MAP ALSO SHOWS THE
MUNICIPALITIES UNDER THE
JURISDICTION OF THE BOARD OF
ELECTION COMMISSIONERS

STEVENS, *Circuit Judge*, dissenting. A "gerrymander" has been defined as "an unfair arrangement of electoral districts designed by the dominant party to give it an advantage over its rival in future elections."[1] It is a means by which the "ins" seek to maximize their advantage over the "outs." As long as legislative bodies are permitted to define the districts from which their membership will be elected, the purpose of the gerrymander will, to some extent, influence the line-drawing process. Inevitably we must tolerate some manifestation of that purpose or else commit the responsibility for districting to a nonlegislative body.

Faced with a choice between undesirable alternatives, some have concluded that "gerrymandering" issues arise in a thicket which courts may not enter; the questions are "political" rather than "justiciable." Others have concluded that its thorny outcroppings may become so gnarled and hideous that decades of accepted doctrine should be leveled by one sweep of a giant scythe;[2] "Invidious discrimination" is constitutionally intolerable. Every gerrymander, indeed possibly every redistricting, is at once "political," and therefore immune, and "discriminatory," and therefore vulnerable.

Twice the Supreme Court has squarely confronted the dilemma. In *Gomillion* v. *Lightfoot*, 364 U.S. 339, it was presented with a redistricting of Tuskegee, Alabama, which altered its shape "from a square to an uncouth twenty-eight-sided figure." 364 U.S. at 340. That legislation was "solely concerned" with the segregation of voters on the basis of race. *Id.* at 341. Viewing the allegations, if proven, as establishing that the act in question was so extraordinary as to be not "even

[1] The American Peoples Encyclopedia (1961 ed.) Vol. 9, p. 538.

[2] Mr. Justice Frankfurter, in his dissent in *Baker* v. *Carr*, 369 U.S. 186, 266, characterized the Court's decision in that case as "a massive repudiation of the experience of our whole past," *id.* at 267, and asserted that the Court had reversed "a uniform course of decisions established by a dozen cases," *id.* at 266.

within familiar abuses of gerrymandering," *ibid.*, the Court promptly and unanimously held such districting unconstitutional.[3]

The following Term the Court was presented with the consequences of 60 years of inaction by the Tennessee legislature.[4] Because of population changes since 1900 and the failure of the state legislature to reapportion itself, the old boundaries had allegedly become "wholly arbitrary, . . . and, indeed, based upon no lawfully pertinent factor whatever."[5] With less unanimity, with less promptness, and without analysis of the term "gerrymander," the Court again decisively invalidated the means by which the "ins" maximized their ability to exclude the "outs."

As a result of those two decisions, it has become clear that some gerrymandering is justiciable, but it remains equally clear that some is still considered political and nonjusticiable. The dilemma survives and is illustrated by the case before us. Plaintiffs represent three groups of "outs"—blacks, Puerto Ricans, and independents—who claim that the "ins" have drawn ward boundaries to maximize their chances of reelection, or stated conversely, to dilute the voting strength of cognizable groups of "outs." In essence, the district court found that no such purpose existed.[6] Judge Fairchild has demonstrated why

[3] The case was argued on October 18-19, 1960, and decided on November 14, 1960. Mr. Justice Douglas joined the opinion of Mr. Justice Frankfurter while adhering to his own dissents in prior cases, 364 U.S. at 348, and Mr. Justice Whittaker concurred on a separate ground, *id.* at 349.

[4] *Baker* v. *Carr*, 369 U.S. 186, was first argued on April 19-20, 1961, although not decided until after reargument in the following Term.

[5] See 369 U.S. at 192, note 13. About one-third of the population elected about two-thirds of the members of both branches of the state legislature. See Mr. Justice Clark's concurring opinion at 253.

[6] In Finding 19 the district court stated, in part, that the record "demonstrates that *the sole basis* for the shaping and formation of the wards in the City of Chicago drawn at those public hearings was the then available federal census data. . . ." (Plaintiffs' Appendix 853) (Emphasis added.) Finding 32 states: "There is *no evidence* that the Defendant City Council of Chicago, in enacting the 1970 ordinance reapportioning the wards of Chicago, intended to dilute or debase the vote of the black population of Chicago, or that of any other ethnic or religious group." (Plaintiffs' Appendix 856-7) (Emphasis added.)

such findings are clearly erroneous. I think he is also correct in concluding that the Supreme Court will afford the same protection against "invidious dilution of voting power" to ethnic as to racial groups. But I reach this conclusion by a route which encompasses "independents" and other significant elements of the body politic as well, and which, notwithstanding the significant imperfections in the City's case, persuades me that the judgment should be affirmed.

I am persuaded (1) that so-called "racial gerrymandering" and "political gerrymandering" must be judged by the same constitutional standard; (2) that the standard is more severe than the test which the majority directs the district court to apply; and (3) that it dictates affirmance on the record before us.

I.

An easy distinction between racial and political gerrymandering was afforded by the fact that the decision in *Gomillion* was rested on Fifteenth Amendment grounds whereas unsuccessful attacks on political gerrymandering have been predicated on the Fourteenth Amendment. The distinction is illusory.

In his concurring opinion in *Gomillion*, Mr. Justice Whittaker succinctly demonstrated that the same result was required by the Equal Protection Clause of the Fourteenth Amendment.[7] Mr. Justice Douglas noted that he adhered to views previously expressed in dissents which presaged *Baker* v. *Carr's* subsequent holding predicated on the Equal Protection Clause.[8] Even the author of the Court's opinion in *Gomillion* later described the holding in that case in terms more appropriate to the Fourteenth than to the Fifteenth Amendment.[9] And to complete the circle,

[7] See 364 U.S. at 349.

[8] See 364 U.S. at 348. Mr. Justice Douglas adhered to the dissents in *Colegrove* v. *Green*, 328 U.S. 549, and *South* v. *Peters*, 339 U.S. 276.

[9] "This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was *Gomillion* v. *Lightfoot*, 364 U.S. 339." *Baker* v. *Carr*, 369 U.S. 186, 300 (Mr. Justice Frankfurter dissenting).

the Court last term actually cited *Gomillion* as though it had been decided on Fourteenth Amendment grounds.[10]

Shortly after the adoption of the Equal Protection Clause, Mr. Justice Miller doubted whether any discrimination except that directed against "negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Slaughter-House Cases*, 16 Wall. 36, 81. But as Mr. Justice Rehnquist has pointed out, 100 years of subsequent adjudication have proved Mr. Justice Miller "a bad prophet with respect to nonracial classification."[11] Indeed, at the turn century, the Court had already extended the list of impermissible classifications to include those depending on

[10] "There has been no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); . . . ." *Whitcomb* v. *Chavis*, 403 U.S. 124, 149.

[11] *Weber* v. *Aetna Casualty & Surety Co.*, 40 U.S.L.W. 4060, 4064 (dissenting opinion) (April 25, 1972).

[12] The *Whitcomb* Court's discussion on pages 153-156 suggests that the Court would apply the same analysis to charges of political discrimination as to charges of racial discrimination. At page 156 the Court indicates that one of the reasons for the rejection of the district court's holding was an unwillingness to accept the result of the application of that holding to other identifiable groups:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's

"differences of color, race, nativity, religious opinion [or] *political affiliations.*" *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89, 92 (emphasis added). More recently, in cases involving voting rights, the Court has made it abundantly clear that invidious discrimination against various kinds of groups, in addition to racial groups, is condemned by the Equal Protection Clause.

Thus, in *Whitcomb* v. *Chavis* the Court plainly stated that it would not countenance districts "conceived or operated as purposeful devices to further *racial or economic* discrimination." 403 U.S. 124,129.[12] The question reserved in *Fortson* v. *Dorsey* related to an apportionment scheme that might "ap-

[12](continued)
view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests. At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country."

While the Court was considering a multi-member district problem in *Whitcomb*, that case is not thereby irrelevant to the case before us. If the Equal Protection Clause requires that discrimination on the basis of race, politics, religion, or economic status must be placed in one category for purposes of evaluating the constituionality of a multi-member district plan, that Clause could hardly permit the setting up of different categories merely because single-member rather than multi-member districting was being evaluated. *Whitcomb* involved two challenges to the districting plan: (1) allegations of inequities resulting from differences in the ultimate weight of an individual vote from a multi-member as opposed to a single-member district on the legislature's decision on a particular issue–a modified "numerical disparity" challenge, and (2) allegations that the Marion County district "illegally minimizes and cancels out the voting power of a cognizable racial minority in Marion County," 403 U.S. at 144. The Court's discussion of the first issue does not, of course, have any direct bearing on the present case. The constitutional analysis of the second issue, however, seems as applicable to single-member as to multi-member districts. The Court held that the impact of the districting plan on the Negro Center Township Ghetto–an impact which appears to be much more severe than anything involved in this case (see note 35, *infra*)–did not constitute invidious discrimination.

pear to minimize or cancel out the voting strength of *racial or political* elements of the voting population," 379 U.S. 433,439, quoted in *Whitcomb* at 143, restated at 144, and also quoted in *Burns* v. *Richardson*, 384 U.S. 73,88. In *Abate* v. *Mundt*, the Court noted the absence of any "built-in bias tending to favor *particular political interests or geographical areas*." 403 U.S. 182, 187. Mr. Justice Douglas has stated that the Equal Protection Clause protects "voting rights and *political groups . . . as well as economic units, racial communities and other entities*." *Williams* v. *Rhodes*, 393 U.S. 23, 39 (separate opinion). The proposition that "legislators represent people, not trees or acres," *Reynolds* v. *Sims*, 377 U.S. 533, 562, is an eloquent restatement of the requirement of "equal representation for equal numbers of people, *without regard to race, sex, economic status, or place of residence within a State*." *Id.* at 560-561. Although quoted out of their context, the words to which I have added emphasis plainly indicate the variety of groups of voters which are equally entitled to protection against invidious discrimination.[13]

As a matter of principle, invidious discrimination against Americans of Polish, German, or Italian ancestry is just as indefensible as discrimination against Americans of African ancestry. It seems equally clear that such discrimination against Catholics, Jews, Protestants or Mormons is in the same category. Unquestionably the same rules must be applied to the classification of voters on grounds of national origin, ethnicity, or religion, as race. It can be demonstrated that political groups are also entitled to equal treatment.

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[13] In *Gray* v. *Sanders*, 372 U.S. 368, 379, the Court wrote:

"Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—*whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.* This is required by the Equal Protection Clause of the Fourteenth Amendment." (Emphasis added.)

The point can be made in two ways, first in terms of impact on the individual's right to vote, and second in terms of impact on the group's political strength.[14]

Almost all of the Supreme Court decisions in the field of voting rights are concerned with discrimination which directly affects the individual right. Abridgment of an individual's right to participate in the electoral process, either by denying him the opportunity to vote,[15] or by counting his vote as worth only a fraction of the vote of another citizen,[16] obviously could not be justified on the basis of political affiliation any more than on the basis of his race. To the extent that an attack on

[14] The gerrymander attacked in *Wright* v. *Rockefeller*, 376 U.S. 52, illustrates how identification of the distinction between the individual's right and the group's interest in having its political strength remain "undiluted" may lead to opposite conclusions. The exclusion of whites from the 18th District protected Congressman Powell's supporters from dilution of their voting power. The gerrymander was therefore defended by black political leaders. If feasible, a random, unsegregated distribution of black and Puerto Rican voters, which constituted 37.7 percent of Manhattan's total, might have given the whites a majority in all four of Manhattan's congressional districts. Under Mr. Justice Douglas's analysis, respect for the individual would clearly justify such a result notwithstanding its dilution of group political strength:

> "Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. *Gray* v. *Sanders*, 372 U.S. 368, 379. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." 376 U.S. at 66.

See also *Reynolds* v. *Sims*, 377 U.S. 533. The Court there wrote:

> "A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature." *Id.* at 561.

[15] *E.g.*, *Nixon* v. *Herndon*, 273 U.S. 536.

[16] *E.g.*, *Baker* v. *Carr*, 369 U.S. 186; *Wesberry* v. *Sanders*, 376 U.S. 1; *Reynolds* v. *Sims*, 377 U.S. 533.

gerrymandering is supported by these cases, its force would apply equally to ethnic, political or racial classifications.

The gerrymander, however, does not directly [17] or necessarily affect the individual right to vote. It is aimed at groups of citizens and is intended to diminish the likelihood that their candidates will be elected. When used as a maneuver against rival political organizations, it is defended as part of our hallowed American tradition, but when directed against minority races, it is attacked as invidiously discriminatory.[18] The validity of the supposed distinction between accepted tradition and invidious discrimination may be tested by considering its application to a specific case.

[17] When the gerrymander takes the form of numerical disparities among districts, there is, of course, a more direct impact on the individual right to vote. But the worst examples of gerrymandering might well occur even with numerical equality. As Mr. Justice Harlan noted in his dissent in *Wells v. Rockefeller*, 394 U.S. 542, 551: "The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." Or, as Mr. Justice White said dissenting in the same case, *id.* at 555:

> "Today's decisions on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities."

[18] It cannot be contended that political gerrymandering has senior status that entitles it to immunity from judicial scrutiny. Unhappily, we must candidly acknowledge the existence of racial discrimination as a part of our American heritage since well before Governor Gerry signed the Declaration of Independence or conceived of the salamander as a ghetto for Federalists. That such discrimination existed is evident—if any authority be needed—from the fact that the Framers of the Constitution provided, in Article I, Section 2, that some persons would be counted as only three-fifths of a person for purposes of allocating representatives among the States.

Discrimination on the basis of national origin is in the same category as racial or ethnic discrimination. Thus, a gerrymander directed at voters of Irish ancestry is invidious, particularly if it also reflects a prejudice against members of one religious faith. But if the parallel interests of the members of such a group should lead them into the same political party, would a gerrymander directed against them cease to be invidious and suddenly become routine politics? On the other hand, if the members of such a group should divide their political affiliation in roughly equal parts between two political parties, is it conceivable that a gerrymander would be tailored on ethnic lines? Whether these questions are answered from the standpoint of the group seeking protection or in terms of the motivation for the gerrymander, it is important to focus on the assumption that all, or many, members of an ethnic group will vote alike. From either point of view the significance of the gerrymander is directly related to the validity of that assumption.

Obviously the success of a gerrymander is dependent on the ability of the "ins" to predict boundaries to fit their predictions. Harry Truman taught us that such predictions are unreliable and *Baker v. Carr*, 369 U.S. 186, has drastically limited the alternative designs which may be used. Nevertheless, inevitably the practical politician will try to predict the blue collar vote, the black vote, the Jewish vote, the suburban vote, the Polish Vote, and many others. Such predictions are realistic reflections of the fact that various components of the body politic share common interests that tend to lead to parallel voting. But it is the parallel character of the voting of members of the group—rather than the source of their common interests—that motivates the gerrymander. Thus the motivation for the gerrymander is a function of the *political* strength of the group at which it is directed. That motivation is unaffected by the kind of characteristic—whether religious, economic, or ethnic—that gives the group political cohesion.

If we turn our attention to the minority group's interest in protection against unfair tactics by the majority, it is again important to remember that we are concerned with the political strength of the group which is, in part, a function of the extent to which the members tend to vote for the same candidates. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. Thus the characteristic of the group which creates the need for protection is its political character. It would be anomalous indeed if the characteristic which made constitutional protection necessary should at the same time make it unavailable. Yet that is the logical consequence of an inflexible rule that "political" gerrymandering is not justiciable.

Unquestionably, particular minority groups can make especially persuasive arguments for protection against political discrimination. The black and the Puerto Rican plaintiffs in this case are appropriate examples. Perhaps their common interests and needs are of such overriding importance today that it would be wise policy to devise special rules to enable their group voting strength to manifest itself. Such a result might accelerate needed social change. But the constitutional protection must be available tomorrow as well as today; it must protect all minority groups equally and without regard to their varying interests in issues of current importance.

In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social

group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination.

In sum, I am persuaded that an evenhanded application of the Equal Protection Clause requires that political groups such as Federalists,[19] members of the "Ohio-American Independent Party,"[20] "crossovers,"[21] unregistered voters, or opponents of an entrenched urban political organization.[22] have the same right to invoke its protection as members of an ethnic, economic or racial group. The constitutionality of a gerrymander depends not on the identity of the rival group which the arrangement is designed to disadvantage, but rather on whether its unfairness is appropriately characterized as "invidious." I believe all gerrymandering should be judged by the same constitutional standard.

II.

When is the majority's deliberate dilution of the voting strength of a minority group impermissible? The question may be answered in many different ways.

[19] The Federalists were the target of the districting plan attributed to Governor Gerry in 1812.

[20] See *Williams* v. *Rhodes*, 393 U.S. 23.

[21] See *Pontikes* v. *Kusper*, ... F.Supp. . . . . (No. 71 C2365, N.D. Ill., March 7, 1972) (decided together with *Klaetsch* v. *Stern*, No. 71 C 2415).

[22] *Shakman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), *Cert. denied*, 402 U.S. 909. *Moore* v. *Ogilvie*, 394 U.S. 814, clearly recognizes "independents" as a cognizable political group. See *id.* at 819.

First: We might be unable to state a "judicially manageable standard" and conclude that all gerrymandering issues are therefore political and nonjusticiable. I believe *Gomillion* forecloses this answer, particularly since that case is now cited as though it had been decided on Fourteenth Amendment grounds.[23]

Second: We might conclude that compliance with the "as nearly as is practicable" standard of mathematical equality of *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8, which in itself has eliminated many flagrant examples of the gerrymander, is a sufficient answer. Under this view, *Gomillion* may be put to one side because it was decided before the numerical standard was developed.[24] This answer has respectable support and certainly is not squarely foreclosed by any Supreme Court holding.[25]

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[23] Moreover, in *Wright* v. *Rockefeller*, 376 U.S. 52, none of the Supreme Court Justices, and indeed none of the district court judges, even suggested that simple answer to the problem presented by that case.

[24] Or, of course, I may be wrong in rejecting the distinction between racial and political gerrymandering. See Judge Sprecher's thoughtful opinion in *Grivetti* v. *Illinois State Electoral Board*, 335 F.Supp. 779, 789 (N.D.Ill. 1971), *affirmed*, ... U.S. . . . ., 40 U.S.L.W. 3542 (May 15, 1972). He wrote:

> "In the present state of federal reapportionment law, it is inconceivable that a state-sponsored plan with near absolute equality could be considered constitutionally infirm, with the possible exception of one incorporating flagrant racial gerrymandering. [Citing *Gomillion*]."

I would agree with his statement if the word "racial" were deleted from it. If the Republicans in Tuskegee, Alabama, all lived in one neighborhood and if the Legislature of Alabama, had enacted a law redefining the boundaries of the city so as to exclude, by means of an uncouth twenty-eight-sided figure, all Republicans from the city, I am confident the Supreme Court would find the act constitutionally infirm.

[25] One element of *Whitcomb* involved a complicated mathematical analysis tending to indicate that, as to ultimate decisions made by the legislature, an individual vote in a multi-member district might have more "weight" than an individual vote in a single-member district. The Court did not, however, consider its "mathematical equality" standard violated by this difference in ultimate "weight." Since the Court proceeded to

Nevertheless, I am persuaded that if a parallel to *Gomillion* should arise today, and if areas A and B identified in Mr. Justice Whittaker's opinion were equally populated, his rationale would provide the basis for a like decision. Otherwise, I cannot explain the Court's citation of *Gomillion* in its recent opinion in *Whitcomb*. See 403 U.S. at 149. Furthermore, the Court considered the gerrymandering claim in *Wright* v. *Rockefeller*, 376 U.S. 52, even though no allegations of numerical disparities were made. *Id.* at 58.

Third: We might parrot the "sole purpose" language from the

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[25] (continued)

consider the other element of the case, see note 12, *supra*, it is difficult to conclude that mere satisfaction of the mathematical standard would render a districting plan immune from constitutional attack. In the many reapportionment cases decided by the Court, it has neither squarely accepted nor squarely rejected mathematical equality as the sole test in all reapportionment cases. Some district court cases have viewed mathematical equality as the sole test where political gerrymandering is at issue, but have taken a different approach where racial gerrymandering is alleged. See *WMCA, Inc.* v. *Lomenzo*, 238 F.Supp. 916, 926 (S.D. N.Y. 1965). The Supreme Court affirmed summarily, 382 U.S. 4. Mr. Justice Harlan concurred on the basis that the case involved partisan gerrymandering, which he viewed as nonjusticiable. Subsequently, however, a case alleging a "systematic and intentional partisan gerrymander" arose in *Wells* v. *Rockefeller*, 394 U.S. 542, and the Court said specifically, at 544: "We do not reach, and intimate no view upon the merits of, the attack on the statute as a constitutionally impermissible gerrymander." On remand the district court assumed the justiciability of the political gerrymander issue, but found plaintiff's evidence insufficient. 311 F.Supp. 48, 53 (S.D.N.Y. 1970), *affirmed* 398 U.S. 901. As I read Judge Cannella's separate opinion, although he considers the process by which a legislature draws boundary lines to be nonjusticiable, he would recognize the propriety of judicial review of the *results* of districting which produced "crazy quilts completely lacking in rationality," or "other wild district configurations," see especially 311 F.Supp. at 56-57. See also other cases cited in the text of Judge Fairchild's opinion following note 18.

Gomillion opinion[26] and find the discrimination "invidious" if it meets that strict standard. A test so phrased would harmonize with *Gomillion* and later cases[27], but would really be no different from simply relying on mathematical equality. For it may be argued in every case since *Wesberry* that achieving numerical equality was the primary, or at least certainly a major, purpose of the redistricting; hence, a gerrymandering purpose could never be the "sole" purpose. I reject this test for the reasons stated above. I have no doubt that resourceful and imaginative legislators, possibly aided by computer technology or academic interns, might be able to devise numerically equal districts that would nevertheless transgress a judicially manageable standard.

Fourth: At the opposite end of the spectrum we might condemn any districting which was tainted by any discriminatory purpose.[28] The test as stated in *Whitcomb*, and restated here by Judge Fairchild, might be so interpreted. That interpretation is entirely proper as a measure of the adequacy of

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[26] "If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is *solely* concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." 364 U.S. at 341. (Emphasis added.)

[27] This appears to be the test which both Judge Feinberg and Judge Murphy applied (with different conclusions on the facts) in *Wright* v. *Rockefeller*. See 211 (sic) F.Supp. 460, 468-471, 471-475.

[28] There is some ambiguity in the opinions of Justices Douglas and Goldberg in *Wright* v. *Rockefeller* because they imply agreement with the standard applied by Judges Feinberg and Murphy, see 376 U.S. at 59 ("[W]here, as here, the line that is drawn can be explained *only* in racial terms, a different problem is presented." (Emphasis added.)), at 61 and at 71-72; but I believe their opinions, fairly read, would condemn *any* reliance on race as "a criterion" in districting. See, *e.g.*:

> "At least, however, appellants' proof made it appear probable that a racial criterion shaped the 1961 reapportionment and that an inference of reliance on such impermissible criterion was more

a claimed justification for a deviation from the requirement of mathematical equality. Because such a deviation directly impinges on the individual's voting right, it bears a heavy burden of justification on recognizably permissible grounds.[29] But I believe a different standard must be applied in a case in which every individual's vote is accorded equal weight and is, therefore, not "diluted" in the sense in which that word has been used in cases descending from *Baker* v. *Carr*.

The claim here is that the discrimination is directed primarily at a cognizable group and, therefore, only indirectly at its members. To the extent that an individual in fact shares the political views of the group as a whole, his chances of voting for the winning candidate may be impaired. But his voice in the selection of that candidate is just as strong as that of every other voter in the election.

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[28](continued)
reasonable than an inference that other factors alone had been used. . . . The simple answer is that appellees made no attempt whatever to rebut the inference that race was a criterion in—or racial segregation a purpose of—the districting.' 376 U.S. at 72-73.

"In the absence of such proof by the State, I am compelled to conclude that racial segregation was a criterion in—or a purpose of—the districting of New York's Seventeenth and Eighteenth Congressional Districts." Id. at 74.

[29]That few grounds, if any, exist to justify a deviation from mathematical equality is apparent from Mr. Justice Brennan's rejection of numerous alternatives in *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 533-536. See also Mr. Justice Harlan's list of ten impermissible considerations which he had discerned in the Court's opinions through *Reynolds* v. *Sims*, 377 U.S. 533, which he set forth in his dissent in that case. *Id.* at 622-623. It does not follow, of course, that just because certain considerations may not provide a rational or permissible justification for deviation from the requirement of strict mathematical equality, that such considerations are also irrational or impermissible justifications for a redistricting plan when it is attacked on grounds other than numerical disparity. A numerical standard is relatively manageable. Outside the numerical disparity category, the difficulty of establishing judicially manageable standards necessarily indicates the need for giving legislatures some greater leeway in redistricting.

Since district or ward boundaries are drawn by the legislative process, they will inevitably reflect compromises and awareness of group interests.[30] If the constitutional standard is so strict

[30] Indeed, the same "group interest" might simultaneously support and oppose the concentration of black voters in a single district.

> "As the majority below pointed out, the concentration of colored and Puerto Rican voters in one area in the county made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of these voters among the districts. Undoubtedly some of these voters, as shown by this lawsuit, would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional." *Wright* v. *Rockefeller*, 376 U.S. 52, 57-58.

My reading of the several opinions in *Wright* persuades me that the majority would not apply the strict standard as espoused by Justices Douglas and Goldberg (see note 28, *supra*) to a gerrymandering case; under that standard, the "findings" of two members of the three-judge district court were just as "clearly erroneous" as those entered by the district judge in this case.

However, it should be noted that Mr. Justice Douglas, in his dissent, clearly expressed his attitude toward the conflicting interests indicated by the above quotation from the majority opinion. He would apparently oppose a classification intended to promote a group interest in matters relating to the characteristic which makes the group an identifiable one. He wrote, 376 U.S. at 67:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here."

Any attempt to redraw districting lines for the purpose of maximizing the number of districts in which black voters would have a majority would, it appears, be inconsistent with Mr. Justice Douglas's approach. His approach affords maximum respect to the individual citizen. He assumes that democracy is best served when individuals vote their individual convictions on political issues rather than vote "for" or "against" their "group." We show disrespect for the dignity to which every man is entitled in the eyes of the law if we do not presume that every individual votes his own convictions rather than merely voting "for" his group. See text preceding note 19, *supra*.

that any purpose to disadvantage a block of voters is enough to warrant the "invidious discrimination" label, the facts of political life will deny legislatures the right to perform the districting function. It is not for me to comment on whether such a drastic change might be desirable; I merely conclude that a test which would require legislators to act with complete indifference to the impact of districting on cognizable groups of voters is simply much too strict. It would either open the door to invalidation of all apportionment plans or require legislatures to perform ridiculous charades in their public deliberations and to do their only significant work in private conference.[31]

Thus, I conclude that the mere existence of some purpose to discriminate against a disadvantaged group is insufficient to invalidate the ordinance.

Fifth: We might analyze the subjective motivation of individual members of the legislative body and void their work product on the basis of evidence of individual discriminatory purpose. Under this approach, sound legislation would be invalidated by the improper motives of its sponsors.[32] For reasons first articulated by Chief Justice Marshall, this approach has been rejected by the Supreme Court consistently since 1810. *Fletcher* v. *Peck*, 6 Cranch 87, 130; *United States* v. *O'Brien*, 391 U.S. 367, 382-384; *Palmer* v. *Thompson*, 403 U.S. 217, 224-225.

In my opinion, customary indicia of legislative intent provide an adequate basis for ascertaining the purpose that a law is intended to achieve. The formal proceedings of the legislature and its committees, the effect of the measure as evidenced by

[31] The paucity of meaningful discussion in the record of the Council proceedings before us suggests that this is what happened here, possibly because the pending litigation had a "chilling effect" on forthright discussion in the Council chambers.

[32] Or conversely, invalid legislation might be saved by the absence of evidence of improper motivation. See Mr. Justice Goldberg's discussion of Judge Moore's opinion, *Wright* v. *Rockefeller*, 376 U.S. 52, 68, 73.

its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents, provide appropriate evidence of legislative purpose. Such facts were sufficient to form a basis for the strong dissent by Mr. Justice White in *Palmer* v. *Thompson*, 403 U.S. at 240-271; certainly the majority of the Court would consider nothing less formal or public. See 403 U.S. at 224-225.

Regardless of one's appraisal of the procedures employed by the City Council of the City of Chicago, it demeans the legislative process[33] to inquire into private conversations between aldermen[34] or to draw an invidious inference from the fact that members of the Council are "acutely aware" of the racial composition of changing areas of the City. Of course they

[33] Proper respect for the legislative process need not, of course, foreclose judicial identification of its weaknesses or its failures. See, *e.g.*, *Groppi* v. *Leslie*, 436 F.2d 331 (7th Cir. 1971), dissenting opinion at 335, *reversed*, 404 U.S. 496.

[34] The underlying basis for the legislative privilege is worth remembering. In its brief *amicus curiae* in the Supreme Court in *United States* v. *Gravel*, No. 71, 1026, O.T. 1971, the United States Senate stated:

> "For not only must the privilege protect a Senator from efforts of the Executive to question his speech, it must, if it is to be meaningful, prevent the Executive from acting in such a way as to inhibit a Senator's use of his aides. To isolate a Senator so that he cannot call upon the advice, counsel, and knowledge of his personal assistants is to stop him from functioning as an independent legislator. If an aide must fear that the advice he offers, the knowledge he has, and the assistance he gives to his Senator may be called into question by the Executive, then he is likely to refrain from acting on those very occasions when the issues are the most controversial and when the Senator is most in need of assistance. If the aide must fear that a vindictive Executive or hostile Judiciary will seek to strike at him because it cannot reach his Senator, then the aide will not be able to give his best service to his superior. And the Senator will never be certain whether the advice he gets and the assistance he receives are not the product of the caution and fear engendered by the threats implied. In order that the Senator be protected from Executive interference, the Executive cannot be permitted to delve into what passes between the Senator and his aide." (pp. 12-13)

are. Responsible legislators are expected by their constituents, black and white, rich and poor, to be informed about such matters. I therefore would wholly reject the kind of subjective motivation analysis which the parties and the district court apparently considered relevant in this case.

Sixth: We might make an objective analysis of the effect of the districting on identifiable groups of disadvantaged voters and invalidate boundaries which deny any such group its proportionate share of districts in which its members constitute a majority. Under this approach, fragmentation of a group plainly large enough to be entitled to elect its own representative, or the consolidation of disproportionately large numbers of one group in a few districts to minimize the number in which they constitute the majority, would be equally vulnerable. Under such an objective standard, the Puerto Rican plaintiffs present a compelling case. The evidence indicates that this group lives in a contiguous area which includes a population (80,000) substantially larger than a single ward (66,582), and yet it does not constitute a majority in any ward because of its fragmentation into three parts by the ward boundaries. But the multi-member districting of Marion County, Indiana, had an equally dramatic impact on an equally cognizable group of disadvantaged voters and was sustained in *Whitcomb* v. *Chavis*.[35]

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[35] The district court in *Whitcomb* found:

> "The Negro Center Township Ghetto population is sufficient in size to elect approximately two members of the House of Representatives and approximately one senator if these were specific single-member legislative districts within Marion County." *Chavis* v. *Whitcomb*, 305 F.Supp. 1364, 1385 (S.D. Ind. 1969).

The district court identified the community of interests of the Center Township Ghetto and explained why the representatives elected at large in the multi-member district did not in fact and would not represent these interests. The district court concluded that the facts established that the multi-member district system resulted in a "minimization of the voting strength" of the defined group and prevented "responsive and effective legislative representation of the described Ghetto voters, though they are

A constitutional requirement of proportional representation for all minority groups would not only be unworkable, but also undemocratic. The difficulty inherent in any attempt to define a group's entitlement to proportional representation would frustrate the formulation of the plan.[36] But even if the groups could be categorized, the reasons why such voter classifications should be abjured in a democracy have been eloquently identified by Mr. Justice Douglas's description of certain electoral register systems. See 376 U.S. at 63-67. At the very least, it is doubtful that the Fourteenth Amendment would permit proportional representation of ethnic groups; it is certain, however, that it does not *require* such a result.[37]

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[35](continued)

numerically large." *Id.* at 1386. The district court thus concluded that the districting plan operated "to minimize and cancel out the voting strength of a minority racial group." *Id.* at 1385.

The Supreme Court held that the facts as found did not constitute a deprivation of the equal protection of the laws. The Court wrote:

> "Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice. We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen." 403 U.S. at 149.
>
> "The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.* at 154-155.

This language is, of course, directly applicable to the record before us.

[36] *Cf. Cassell* v. *Texas*, 339 U.S. 282, 286-287.

[37] *Ferrell* v. *Hall*, ... U.S. . . . ., 40 U.S.L.W. 3556 (May 22, 1972), *affirming*, *Ferrell* v. *Oklahoma ex rel. Hall*, 339 F.Supp. 73 (W.D. Okla. 1972). See also the quotation from *Whitcomb* in note 12, *supra*.

The holdings in *Whitcomb* v. *Chavis* and *Ferrell* v. *Hall*, 40 U.S.L.W. 3556, 3553 (sic) necessarily reject a standard which would invalidate every gerrymander which has a significant impact on the number of districts in which any cognizable group constitutes the majority.

Seventh: In both *Whitcomb* v. *Chavis* and *Wright* v. *Rockefeller*, 376 U.S. 52, the Court implied that the validity of a gerrymander may be measured by the legislature's "purpose." In *Wright* the Court stated that the proof failed to establish a "state contrivance" to segregate on the basis of race,[38] and in *Whitcomb* the Court stressed the absence of any suggestion that the districts were conceived as "purposeful devices" to further racial or economic discrimination.[39] Words like "contrivance," "device," and "purposeful" obviously may have different significance for different members of the Court,[40] but do suggest that the use of such concepts in other cases involving the Equal Protection Clause be considered.

Customarily, claims predicated on the Equal Protection Clause involve some analysis of the "purpose" of the legislative classification under attack. Different adjectives have been used to describe the objectives, or state interests, that will justify legislative classifications. One broad category includes terms like "compelling," "substantial," "subordinating," "paramount," "cogent," and "strong," see *United States* v. *O'Brien* 391 U.S.

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[38] "It is plain to us that the District Court was not compelled to find that these districts were the product of state contrivance to discriminate against colored or Puerto Rican voters." 376 U.S. at 57.

"We accept the District Court's finding that appellants have not shown that the challenged part of the New York Act was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.* at 58.

[39] "But there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S. at 149.

[40] See *Palmer* v. *Thompson*, 403 U.S. at 242-243.

at 376-377, and cases there cited; whereas another category merely describes what is to be avoided with words like "irrational," "arbitrary," "impermissible," or the phrase "wholly irrelevant to the achievement of a valid state objective." In the former category, a heavy burden of justification rests on the state, whereas in the latter, a heavy burden rests on the litigant who seeks a declaration that a statute is unconstitutional.

As between the two alternatives, quite obviously the "compelling state interest" standard could seldom be satisfied in an apportionment case. Rarely would a state have a sufficiently strong interest in a particular set of boundaries, as opposed to alternatives which could be suggested, to satisfy that test. The holding and reasoning of the *Whitcomb* case itself, with its heavy emphasis on the need for setting a standard which can "contain" districting litigation within judicially appropriate bounds, see, *e.g.*, 403 U.S. at 156, forecloses the acceptance of such a strict test. *Whitcomb* plainly demonstrates that the burden which plaintiffs must overcome is a severe one, comparable, though the words are not used in the opinion, to a showing that the legislative classification "rests on grounds wholly irrelevant to the achievement of a valid state objective." *Turner* v. *Fouche*, 396 U.S. 346, 363. I am persuaded that such a test provides a workable guideline for judicial management of gerrymandering litigation.[41]

Under that standard the "purposes" of the legislation can be identified by customary indicia of legislative intent. If the basic plan is designed to follow historic political boundaries, natural

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[41] When the question is the number of persons to be represented by each representative, the Supreme Court's decisions (*e.g.*, those cited in note 16, *supra*, and *Kirkpatrick* v. *Preisler*, 394 U.S. 526) have made it perfectly clear that the only valid state objective is numerical equality and that any other ground will be presumed to be wholly irrelevant to that purpose unless the state establishes a "compelling" justification. See note 29, *supra*.

barriers, or reflects a consistent endeavor to achieve compactness to the extent allowed by the requirements of contiguity,[42] and, of course, if the equal population requirement is met, rarely if ever could a plan be attacked as wholly irrational.

But if inexplicable, grotesque shapes, reminiscent of *Gomillion*, or the Massachusetts shoestring, or the Illinois saddlebag, should emerge,and if the pattern should be explicable only by reference to a purpose to segregate or to disadvantage a definable group, the absence of a permissible basis for the classification could be established by proof.[43]

This is not to suggest that every gerrymander may be identified by mere inspection of configurations. Unquestionably at times unique shapes will be produced by the need to satisfy the requirement of equal numbers or some other legitimate factor. But if a highly improbable shape is inexplicable except

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[42] Parenthetically, I should observe that "compactness," or the nearest practical approximation thereto, even if judicially manageable, does not even arguably provide a standard for interpretation of the Equal Protection Clause. Plaintiffs do not contend otherwise. They rely on lack of compactness as (1) a violation of Illinois law, and (2) evidence of discrimination. The Supreme Court has discounted the importance of geographical compactness. See *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 535-536. The basis for the requirement of numerical equality is the individual voter's right to have his vote counted equally with that of every other citizen voting in the same election. The shape of the election district does not itself affect the individual voter. There is no federal constitutional right to vote in a compact election district. When there is an effect on the individual's voting right, such as denying him the right to vote for even a limited time, the state must present a "compelling" justification. *Dunn* v. *Blumstein*, ... 40 U.S.L. W. 4269, 4273 (March 21, 1972).

[43] Although *Yick Wo* v. *Hopkins*, is famous for its statement of legal principles, a few salient facts made the outcome of the litigation inevitable:

> "And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions." 118 U.S. 356, 374.

by reference to an impermissible gerrymandering purpose, in my opinion a challenge to the classification as resting on a ground wholly irrelevant to the achievement of a valid state objective should be sustained. In sum, notwithstanding equality of numbers, and notwithstanding the particular reason why the classification of voters was impermissible, I would expect another case like *Gomillion* again to produce prompt and unanimous disapproval from the Supreme Court.

iii.

In deciding whether plaintiffs are entitled to another trial, their evidence should be construed liberally in their favor. So interpreted, it establishes three factual propositions: (1) the statistical evidence demonstrates that the ward boundaries were not drawn by a process of random selection; (2) the deviations from random criteria had an adverse impact on the political strength of each of the three groups of plaintiffs; and (3) the City Council was aware of the consequences of its actions.

Plaintiffs' evidence is therefore sufficient to support the inference that political, ethnic, and racial factors were among the criteria considered by the Council in drawing the ward boundaries. Under the strict standard espoused by Justices Douglas and Goldberg in dissent in *Wright* v. *Rockefeller* (see note 28, *supra*), a remand for a new trial as to all three groups would be appropriate. Indeed, under that standard, almost every deviation from the results which would be expected from the exclusive use of random or neutral factors would presumably provide some disadvantaged political group with the right to judicial review of election district boundaries. For proof of adverse impact would raise the inference that the legislature was conscious of the discriminatory results of its work, and thus some evidence of an improper purpose would exist.

My understanding of the word "contrivance" in *Wright* v. *Rockefeller*, the words "purposeful device" in *Whitcomb* v. *Chavis*, and the word "uncouth" in *Gomillion*, limits the

availability of judicial review to much more egregious cases. I do not suggest that facts as extraordinary as those alleged in *Gamillion* are necessarily required,[44] but I am persuaded that if compliance with the standard of population equality is present, judicial intervention is not warranted unless the facts dramatically and convincingly foreclose any permissible construction of the legislature's work. This plainly is not such a case.

Indeed, plaintiffs' own evidence identifies an acceptable explanation for the deviations from results which would be expected to follow from the use of purely random criteria. The principal purpose of the City's plan was, of course, to meet the requirement of substantial equality of population. Within that structure plaintiffs' evidence demonstrated that the Council's major guideline was the retention of the old ward boundaries to the extent that it could do so.[45] The adverse impact on the plaintiffs was in the nature of a by-product of that basic plan.

The question then is whether the attempt to adhere to pre-existing ward boundaries satisfies the requirement of relevance to the achievement of a valid State objective. Unquestionably a plan based on historic boundaries will not reflect a random distribution of ethnic or racial groups because such

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[44] It is of interest to note, however, that the gerrymander which coined the name for this invidious practice was also described as "uncouth" and enabled 50,164 Democrats to elect 29 representatives as opposed to only 11 elected by 51,766 Federalists. That uncouth result was much more flagrant than anything suggested by this record and was promptly cured by a political remedy. See Encyclopedia Brittanica (11th Edition, 1911), Vol. 11, p.904.

[45] One of plaintiffs' experts, Pierre DeVisé, testified, in part:
"A. I do not think that race was a major consideration. I think that the major consideration was probably the renention of the old wards. . . . I would look upon the retention of the old wards with all of the kinds of pressure, including racial consideration that went into these wards, [as] the major determination of what the new wards were like." Plaintiffs' Appendix 188-190.

groups have tended to concentrate in adjacent geographical areas throughout Chicago's history. Nevertheless, I think it is clear that the preservation of historic political boundaries is an acceptable State or municipal objective in redistricting.[46] Since the disadvantages of which plaintiffs complain are explicable by reference to that objective, the discrimination is not "invidious." *Cf. McGowan* v. *Maryland*, 366 U.S. 420, 425-426.

It must be remembered that the adverse impact on the plaintiffs is based on a comparison with a theoretical ideal, rather than with preexisting ward boundaries. Significant abuses in the form of population disparity have largely been eliminated as a consequence of *Baker* v. *Carr* and subsequent cases. The Supreme Court has plainly indicated that once the requirement of population equality is satisfied, the judiciary is to play only a limited role in the essentially political task of drawing boundaries for election districts. The *Gomillion* decision remains viable as a protection against flagrant gerrymandering, but does not, in my opinion, control the disposition of this case. Cf. *Wright* v. *Rockefeller*, 376 U.S. 52. Plaintiffs' case is significantly weaker than *Wright* v. *Rockefeller*. The record in that case contained persuasive evidence of reliance on impermissible factors and no evidence of justification on the basis of an acceptable criterion. The Supreme Court's affirmance of the order dismissing that complaint persuades me that a like result is required here.

I respectfully dissent.

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[46] In any reapportionment, the most logical starting point is existing boundaries. They need be varied only to the extent necessary to achieve numerical equality. Stability is maintained and election mechanics are simplified when most of the people continue to vote at the same polling place in the same district. The fact that the multi-member district in *Whitcomb* v. *Chavis* was designed to avoid splitting up Marion County into separate districts was apparently regarded by the Supreme Court as sufficient justification for the lack of representation in fact of the interests of a cognizable group of voters. See note 35, *supra*.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

June 23, 1972

HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. WALTER J. CUMMINS, Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge

WILLIAM COUSINS, JR., *et al.*,
Plaintiffs-Appellants,

No. 71-1077

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, *et al.*,
Defendants–Appellees.

v.

MARY LEE LEAHY,
Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (70 C 3202)

On consideration of the petitions for a rehearing and suggestions that the above-entitled cause be heard *en banc*, filed herein, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petitions for a rehearing in the above-entitled cause be and the same are hereby denied.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

No. 72-174

AUG 27 1972

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Petitioners,

vs.

WILLIAM COUSINS, JR., A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL and MARY LEE LEAHY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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References herein are made as follows: References to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit of July 27, 1972 are made by the term Petition followed by the page number. References to the opinion in this case of the United States Court of Appeals for the Seventh Circuit are made by reference to Appendix B contained in the Petition followed by the page number therein. References to the Appendix for Plaintiffs-Appellants in the Court of Appeals are made by the abbreviation App. followed by the page number.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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On Petition For A Writ Of Certiorari To
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The Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTIONS PRESENTED.

The primary question here presented, and the only question essential to a determination of the Petition, is:

Whether the Court of Appeals for the Seventh Circuit erred in finding that the trial court's rulings were "clearly erroneous" and remanding the case for a new trial.

As is shown in the Argument section of this Brief, none of the Questions Presented set out in the Petition (2-3) is in fact presented by the facts of this case or the Court of Appeals' decision.

STATEMENT OF THE CASE.

In the late fall of 1970 the Chicago City Council adopted an ordinance reapportioning the city's fifty wards. The complaint in this case was quickly filed and brought on almost immediately for a trial which lasted about three weeks. The principal claim asserted in the complaint was that the ward boundaries had purposefully been drawn so as to minimize the number of wards in which the majority would be Black, Puerto Rican or independent voters. (B4) (Complaint, App. 5-17)

Proceedings In The Trial Court.

At trial fifteen witnesses and much documentary evidence was presented by the plaintiffs. One witness and almost no documentary evidence was presented by the defendants. Thereafter, the trial court entered judgment for the defendants.

The trial court's findings of fact and conclusions of law[1] indicate something about the disposition of this case

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[1] The trial court's findings of fact and conclusions of law are set out in 322 F. Supp. 428 and at App. 845-65. The district court also made oral findings reported at App. 839-845, about which the Court of Appeals stated: "In certain respects these findings recited matters of record, already pointed out. In other respects, they are wholly inconsistent with the record. . . ." (B17)

at trial. There are forty-one numbered paragraphs of findings. All of them are exactly as were proposed by the defendants, word for word, comma for comma. The conclusions are virtually the same: the first eleven paragraphs, and the judgment-directing portion, are those which were proposed by the defendants; only the few unnumbered paragraphs which follow were added by the court. In fact, a comparison of the proposed findings and conclusions submitted by defendants Mayor and City Council (App. pp. 817-31) and the additional proposed findings and conclusions submitted by the defendant Board of Election Commissioners (App. pp. 832-37) with those entered by the court shows that the latter consist of the two proposed sets not even retyped but cut and pasted together and then xeroxed.

This wholesale acceptance of one side's proposed findings and conclusions is particularly significant in view of the fact that at no time prior to the day of judgment did the court state how he would decide the case, how he would decide the facts or what his views were on many of the legal questions.

As is specifically indicated at many places in the Court of Appeals' opinion, the trial court found facts which were "wholly inconsistent with the record" (B17) or "clearly erroneous." (B8, B12-B13, B14, B25)[2] The findings are vague, ambiguous and so general and unexplained as to amount to nothing more than gross conclusions;

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[2] Even the dissenting opinion in the Court of Appeals agreed that principal findings of the trial court were clearly erroneous. (B34-35)

and some important matters aren't covered at all. The conclusions are little better.[3]

The Court Of Appeals' Decision.

Within one week of entry of the trial court's findings and conclusions the plaintiffs filed their notice of appeal and brief with the United States Court of Appeals for the Seventh Circuit. On March 1, 1971 the United States Department of Justice, which had not previously been involved in the case, filed its brief in the Court of Appeals supporting the plaintiffs' position. Among other reasons, the Department of Justice explained that it had intervened because:

> ". . . we are concerned with whether the district court applied the correct legal standard. Conclusions 9 and 10 suggest the court below perceived the case as one seeking absolute racial proportioning of aldermanic seats. Our understanding, however, is that the theory of plaintiffs' case was that purposeful minimization of racial and ethnic voting strength had occurred in establishing the new wards. This was supported by evidence of statistical disparity. Thus, the legal theory is closely related to principles discussed in *Gomillion* v. *Lightfoot*, 364 U.S. 399 (1960), and *Sims* v. *Baggett*, 247 F.Supp. 96, 107-110 (M.D. Ala. 1965). *Cf. Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965);

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[3] Any notion that the nature and quality of the findings and conclusions are explainable in terms of a shortage of time would be incorrect. Indeed, the district judge, over plaintiffs' strong objections, allotted far too much time to defendants for the submission of their proposed findings and conclusions (after plaintiffs' had already been filed) — and for his own review of them. (See letter from plaintiffs' counsel to district judge at App. 814-15.) The letter was unsuccessful in its attempt to bring about a speedier decision.

Burns v. *Richardson*, 384 U.S. 73, 88-89 (1966)." (Memorandum for the United States as Amicus Curiae, pp. 3-4.)

On May 25, 1972 the Court of Appeals released its opinion in this case reversing the trial court, ordering a new trial before a different judge and elaborately reviewing the evidence in a lengthy opinion. Judge Stevens dissented. A petition for rehearing with a suggestion for rehearing *en banc* was denied on June 23, 1972, no judge in active service having requested a vote thereon. (Petition App. C)

Various portions of the Court of Appeals' opinion are discussed in the Argument section of this Brief. In summary, the majority found that virtually every major finding of the trial court with respect to the central claim of racial or ethnic (Puerto Rican) gerrymandering was "clearly erroneous" (B8, B12-13, B14-15, B25, B34-35) and that the trial court had failed to consider important elements of plaintiffs' case. (B25)

After reviewing the extensive evidence introduced by the plaintiffs, the court concluded (1) that Alderman Keane, the controlling force on the City Council committee which redrew the ward boundaries (B14, App. 131-2, 101-02), had considered the location of Blacks and Puerto Ricans in drawing those boundaries and (2) that the evidence supported the inference that the boundaries of certain wards were chosen so as to exclude Puerto Ricans from the ward or to put Black persons in a minority in the ward. (B24) From its review of the record the Court of Appeals stated:

". . . we think there is substantial evidence tending to show that Alderman Keane considered the race of residents at least with respect to particular lines

> and areas, and, since he directed the drawing of the map and made the choices of territory, it seems fair to impute his consideration to the council in its enactment of the ordinance. *Although we are not prepared to measure, on this record, any discriminatory effect which may have resulted, we think that the findings must be set aside until the question has been more fully explored in the district court.*" (B14, emphasis supplied.)

In reviewing the evidence, the Court of Appeals also discussed the relevance of an extremely important area of proof about which the trial court had also taken a "clearly erroneous view." This was testimony concerning the preparation in Alderman Keane's private law office, by college student interns paid by the city, of a secret reapportionment map ("Secret Map") surreptitiously used by Alderman Keane at official sessions of the City Council at which the new ward boundaries were officially drawn. The facts surrounding the Secret Map and the discovery of its existence during trial are like an episode from Perry Mason. The discovery established that Alderman Keane had perjured himself in this case, as the Court of Appeals found in effect. The court pointed to the fact that in a pretrial deposition Alderman Keane "was emphatic that the map he used at the public hearings was the only map he used, he did not volunteer the fact about the Bell-student map in answers where such disclosure would have been appropriate." (B11) The interns who worked on the map testified that they were told by Mr. Keane and his aide, Mr. Bell, to keep their work secret. (B10) After reviewing all of the evidence surrounding the Secret Map the Court of Appeals stated:

> "Although the district court found that preparation of this map was 'an academic exercise,' we consider the finding clearly erroneous, and that such preparation was at least a trial run for the process later

> conducted at public hearings. It is important because certain conversations in the course of its preparation showed that race was at least thought about in connection with particular ward lines. A lack of candor concerning the existence and purpose of the Bell-student map detracts nothing from the weight of such evidence." (B8)

In fact, the court noted that the city had also, in effect, lied to the Court of Appeals in an earlier mandamus proceeding, filed after the Secret Map had been prepared, in which the city had denied as "evanescent stuff" a claim that it had a map already prepared. (B11)

It is in this context, before a new trial judge is given the opportunity to explore the evidence, including plaintiffs' evidence erroneously ignored by the court in the first trial, that the petitioners ask this Court to take the case for review.

ARGUMENT.

Respondents respectfully submit that a writ of certiorari should not be issued because the case is not ripe for review. Respondents further submit that the petitioners' arguments why this case should be reviewed are based on misstatements of the facts, the Court of Appeals' opinion and the preexisting law. The opinion is not in conflict with any decision of this Court, nor is there a conflict among the circuits.

I. THE CASE IS NOT RIPE FOR REVIEW.

The decision of the Court of Appeals which petitioners would have this Court review is not a final judgment. Rather, it reversed and remanded the case to the district court for further proceedings. No injunctive or other relief has yet been granted. Normally such nonfinal judgments will not be reviewed. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967), where this Court stated, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court", and *American Construction Co.* v. *Jacksonville R.R. Co.*, 148 U.S. 372, 384 (1893).

Review of the case at this stage, before retrial, would create the possibility of unnecessary or multiple review by this Court. It would also require this Court independently to evaluate several thousand pages of transcript and documentary evidence generated during the course of a three-week trial. Such review would necessarily be without the benefit of a reliable trial court opinion, since the Court of Appeals concluded that the trial court's findings

in many crucial areas were "clearly erroneous" or "failed to consider important elements of plaintiffs' case." (See pages 6-7 *supra*)

Moreover, the Court of Appeals declined to rule on certain important objections by plaintiffs to the trial court's rulings on evidence submitted by the defendants because the problem would not arise on retrial. (B29) In this respect also there is no final judgment ripe for review.

II. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY OPINION OF THIS COURT.

The petitioners have repeatedly misrepresented plaintiffs' position as seeking a ward reapportionment plan in which the proportion of the wards which are composed of populations which are majority-Black or majority-Puerto Rican equals the Black or Puerto Rican proportion of Chicago's total population. (Petition 12) That is not and has never been the plaintiffs' position. (See, *e.g.*, Reply Brief For Plaintiff-Appellants and Intervenor-Appellants, in the Court of Appeals, pp. 19-20) As the Department of Justice correctly stated to the Court of Appeals, "the theory of plaintiffs' case was that purposeful minimization of racial and ethnic voting strength had occurred in establishing the new wards." (See p. 4 *supra*) The petitioners would also have this Court believe that the Court of Appeals adopted a proportional representation test. (Petition 13) This is also not true. The Court of Appeals in this case properly applied the well-established rule that "members of a racial or ethnic group are protected, in our opinion, from having ward lines drawn for the purpose of diluting or minimizing the voting power of such groups." (B 21) The decision of the Court of Appeals in this case is thus squarely in ac-

cord with this Court's decisions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964).[4]

Indeed, at one point in their Petition the petitioners explicitly recognize that the Court of Appeals applied the correct rules of law in this case. They describe the opinion as holding

> "that there is no principle requiring a minority racial or ethnic group to have any particular voting strength reflected in the legislative districting. On the contrary, it rules that the true principle is that such voting strength 'must not be purposefully minimized on account of race or ethnic origin.'" (Petition 7)

Nor is the Court of Appeals' decision in conflict with this Court's summary affirmance in *Ferrell* v. *State of Oklahoma ex rel. Hall*, ... U.S. ....., 40 L.W. 3553 (May 22, 1972). Among other things, in that case the trial court had found that "no witness testified as to hearing any expression of intent on the part of any Legislator

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[4] In both *Whitcomb* v. *Chavis* and *Wright* v. *Rockefeller* this Court recognized the principle applied by the Court of Appeals in the present case. In *Whitcomb* this Court said: "There has been no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights. [citing cases] But there is no suggestion here that Marion County's multi-member districts, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination." (403 U.S. at 149)

In *Wright* this Court said: "We accept the findings of the majority of the District Court that appellants failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew districts on racial lines." (376 U.S. at 56)

to discriminate against any minority race. . . ." *Ferrell* v. *State of Oklahoma ex rel. Hall*, 339 F.Supp. 73, 80 (W.D. Okla. 1972). The opposite is true in the present case. (B24)

Moreover, in considering the weight to be given to the defendants' claim that race and ethnic origin played no part in the ward reapportionment, it should be noted that Alderman Keane testified, and the trial court found, that the "sole basis" for the ward boundaries was the census population figures. Significantly, both the majority and dissenting opinions in the Court of Appeals found that this conclusion was clearly erroneous. (B8, B13-14, B34-B35 & n.6) In short, Keane lied.

A word must also be said about the petitioners' effort to convince this Court that the Court of Appeals has created a new rule of law which would decide a reapportionment case solely upon the motives of any of the individual legislators who adopted the reapportionment. (Petition 16-18) No such test was applied or suggested. Rather, the Court of Appeals noted that since Alderman Keane "directed the drawing of the map and made the choices of territory, it seems fair to impute his consideration to the council in its enactment of the ordinance." (B14) The court then considered some specific actions by Alderman Keane and his aide, Mr. Bell, which resulted in discriminatory *effects:*

> "There is evidence from which it could be inferred that the contours of the 31st ward were chosen for the purpose of avoiding the presence of Puerto Rican residents, that those of the 18th ward were chosen for the purpose of putting black people in a minority in that ward in place of joining those people with

> other black people in a possible majority status in another ward, and, perhaps less readily, that the location and contours of the 14th were chosen so that black people would be an insubstantial minority therein." (B 24)

This is the same analysis which this Court sanctioned in *Wright* v. *Rockefeller, supra,* 376 U.S. at 56: whether the "Legislature was either motivated by racial considerations or in fact drew districts on racial lines."

The petitioners' effort to create a bogus conflict among the circuits on the basis of the Fourth Circuit's decision in *Holt* v. *City of Richmond,* 459 F.2d 1093 (1972), is a distortion of both that case and this one. (Petition 17-18) In *Holt* the Court held that governmental action which was initiated in 1961 for legitimate, nondiscriminatory reasons was not rendered unconstitutional because supported by some legislators in 1969 for reasons related to race. (459 F.2d at 1099-1100) The case at bar, on the other hand, involves purposeful racial discrimination, with substantial discriminatory effects.

III. THE COURT OF APPEALS ACTED PROPERLY IN ORDERING A NEW TRIAL.

The petitioners seek to mislead this Court into thinking that there was substantial conflicting evidence introduced at trial and that the Court of Appeals disregarded the trial court's rulings on the credibility of witnesses and resolved such conflicts itself. (Petition 18-20) But the two alleged examples cited by the petitioners both fail to support their assertions. Thus they say that "the District Court found plaintiffs' star witness, Taylor, 'confused,'" and that "the Court of Appeals based its reversal

of the District Court largely on Taylor's testimony." (Petition 19) The fact is that the Court of Appeals at B7-B13 and B14-B20 extensively reviewed not only Mr. Taylor's testimony but also corroborative testimony of at least ten other witnesses, one of whom was petitioners' witness.

The other conflict in testimony alleged by the petitioners was between Professor Murray (the university professor who was in charge of the student interns) and Mr. Keane's assistant, Mr. Bell, the man who actually drew the Secret Map. The issue on which the alleged conflict of evidence arose was whether the Secret Map was merely "an academic project." The fact is that a great quantity of uncontroverted evidence established that it was not "an academic project" (see, *e.g.*, B8-B13) and the Court of Appeals so found. Professor Murray merely added a small amount of additional testimony with respect to the question of whether the map was an academic project. He said that shortly after Mr. Bell learned that the plaintiffs were in touch with or had subpoenaed the student interns who worked on the Secret Map, Mr. Bell "appeared to be quite shaken" and said that it would "be a difficult position to take. I am not sure whether he used the word 'difficult' or not, but Mr. Bell suggested that he would not be able to take that position [that the map was merely an academic exercise]." (B12) Mr. Murray's testimony was not controverted by Mr. Bell and, in any event, merely corroborated a great deal of other evidence that the Secret Map was not merely an academic exercise.[6]

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[6] A mere review of the Secret Map and the final enacted ward map, both of which were part of the record in the Court of Appeals, showed so many astounding simi-

Petitioners are also clearly wrong in contending that the Court of Appeals ruled "that failure of the plaintiffs to prove their case does not justify entry of judgment against them unless the defendants also prove the negative." (Petition 19-20) In fact, the Court of Appeals merely noted the lack of evidence on defendants' part. This lack of evidence was certainly noteworthy in view of the substantial evidence introduced by plaintiffs that race and Puerto Rican origin *had* been taken into account in drawing the ward boundaries. (B14-B20, B24)[7]

Moreover, the petitioners' contention that the plaintiffs had not proven their case must be read against the Court of Appeals' conclusion that the trial court's crucial findings on racial and ethnic gerrymandering were "clearly erroneous" and that the trial court had "failed to consider elements of plaintiffs' case." (B25) The Court of Appeals obviously felt that, notwithstanding the strong evidence put in by the plaintiffs, in view of the fact that crucial findings and conclusions by the trial court were clearly erroneous, the only just result was to remand the case for a new trial, which, incidentally, will be before a different judge.

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[6] (Continued)
larities that there can be no real question that the Secret Map was the basis for the final map. Photographic reproductions of various wards from the two maps are set out in the [Court of Appeals] Brief for Plaintiffs-Appellants and Intervenor-Appellant, pp. 27-28. One look at them makes clear that the Court of Appeals was correct.

[7] Moreover, it would be appropriate in these circumstances to shift the burden of proof to the defendants. See, *e.g.*, *Turner* v. *Fouche*, 396 U.S. 346, 359-60 (1970); *Jones* v. *Georgia*, 389 U.S. 24, 25 (1967).

IV. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE TRIAL COURT TOOK THE WRONG VIEW OF THE SECRET MAP AND THUS DISREGARDED CRUCIAL EVIDENCE.

The petitioners' last argument (Petition 21-24) is that the Court of Appeals erred in holding that the Secret Map had a relation to the ward map enacted by the Chicago City Council. This section of the Petition is made up almost exclusively of distortions of the record and of the Court of Appeals' decision. The points made by the petitioners are responded to in the order raised.

First, the Secret Map was a "crude ward map" (Petition 21) in terms of population equality between wards only because it was based upon the incomplete census data available at the time it was being drafted (B11); the students did not have the more detailed census information which later became available (See App. 404-05). Moreover, the public hearings referred to by petitioners (Petition 21-22) were indeed an empty formality since Alderman Keane drew the new ward map virtually singlehandedly. (B14, App. pp. 131-32; 101-02)

Second, the argument (Petition 22-24) that there was no evidence of discrimination with respect to the 7th, 31st, 14th, 16th and 18th wards are simply contrary to the evidence. That evidence established, at a minimum, that race was taken into account in drawing ward lines and that certain areas were included or excluded for reasons of race or ethnic origin. See the discussion of the evidence at B14-B15 (7th Ward); B15-B16 (31st Ward); B16-B17 (14th and 16th Wards); B17-B18 (18th Ward).

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Finally, a few words must be said about Judge Stevens' dissenting opinion, which is both contrary to existing law and would, if accepted, make it virtually impossible to prove any gerrymandering.

Judge Stevens concludes that "judicial intervention is not warranted *unless* the facts dramatically and convincingly *foreclose any permissible construction of the legislature's work.*" (B57) (emphasis supplied) It is hard to imagine a case in which some "permissible construction" cannot be concocted and placed upon the legislature's work. Moreover, when this standard of review is coupled with Judge Stevens' conclusion that "it demeans that legislative process to inquire into private conversations between aldermen" (B50), the result is the death knell to ever proving a racial gerrymander short of another case like *Gomillion* v. *Lightfoot*, 364 U.S. 399 (1960)—which realistically can hardly be expected to occur.

If "any permissible construction of the legislature's work" precludes judicial review *and* if the court is limited to consideration of evidence of the text of the law, its setting and "the public acts and deeds" of the legislature (B50) the result will be that, unless a legislator publicly announces on the floor of the legislature that he has engaged in a racially discriminatory gerrymander, it will never be proven.

Not surprisingly, the rules proposed by Judge Stevens are not the law this Court has applied. Thus, in *Whitcomb* v. *Chavis, supra*, 403 U.S. at 149, the Court said:

> ". . . there is no suggestion here that Marion County's multi-member districts, or similar districts through-

> out the State, were *conceived or operated as purposeful devices to further racial or economic discrimination.*" (emphasis supplied)

And in *Wright* v. *Rockefeller, supra,* 376 U.S. at 56, the Court said:

> "We accept the findings of the majority of the District Court that appellants failed to prove that the New York Legislature was either *motivated by racial considerations or in fact drew districts on racial lines.*" (emphasis supplied)

Judge Stevens' rules would indeed be novel. They would fly in the face of justice and make judicial protection effectively unavailable against the most far-reaching and important form of racial discrimination which may be practiced in a democracy.

CONCLUSION

For the foregoing reasons respondents respectfully submit that the petition for a writ of certiorari should be denied.

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Dated: August 25, 1972.

SEP 28 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-174

CITY COUNCIL OF THE CITY OF CHICAGO, AND RICHARD J. DALEY, INDIVIDUALLY AND AS MAYOR OF THE CITY OF CHICAGO,

vs. *Petitioners,*

WILLIAM COUSINS, JR., A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL AND MARY LEE LEAHY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF THE PETITIONERS.

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REPLY BRIEF OF THE PETITIONERS.

The respondents, in their brief in opposition, make several misstatements which we believe should not be permitted to go uncorrected. These are:

(1) On page 2 of their brief in opposition, respondents state that defendants presented "[o]ne witness and almost no documentary evidence." The fact of the matter is that the defendants presented five witnesses: Alderman Thomas E. Keane, Alderman Paul T. Wigoda, Alderman Claude W. B. Holman and Commissioner of Development and Planning and of Urban Renewal Lewis W. Hill (the depositions of these four witnesses were taken in open court in the presence of the trial judge (App. 77-119); (Add. App. 1-348) and subsequently were incorporated in the record by order of court (Add. A. 1)) and Edwin J. Bell (A. 493-525a; Add. A. 701-738). And, indeed, on page 11 of their brief in opposition, respondents unguardedly state "Alderman Keane testified." The defendants also introduced as an exhibit the complete 716 page transcript of proceedings before the City Council subcommittee that compiled the draft of the reapportionment ordinance; that transcript was also filed in the reapportionment case in which equality of population of the wards was in issue, *Skolnick* v. *Mayor and City Council of Chicago* (N. D. Ill., No. 66 C 2134) and was part of the record on appeal in that case (7 Cir., No. 18878). In addition, the defendants produced maps, overlays, census figures, statistical analyses and lists of aldermanic candidates, with indications of their race. See, for example, the large color map of the City of Chicago, showing on one map both the 1970 census tracts, with the population of each, and the ward boundaries under the 1970 ordinance (Add. Book of Exhibits).

(2) On page 3 of their brief in opposition, respondents attempt to belittle the findings of the District Court because it in large measure adopted the findings proposed by the defendants. Respondents neglect to state that these findings were not retyped because the case was being heard on an emergency basis, at plaintiffs' request, and plaintiffs had informed the Court that they strongly desired

to file their notice of appeal at the earliest possible moment. Nor is it error for a trial court to adopt, even *in toto*, the findings proffered by one of the litigants, and none of those offered by the other parties, if the court concludes that the findings it is adopting are correct.

(3) On page 6 of their brief in opposition, respondents state that there was testimony that the students' map was "surreptitiously used by Alderman Keane at official sessions of the City Council at which the new ward boundaries were officially drawn." There is no evidence of that in the record. Nor did the Court of Appeals find that Alderman Keane "perjured himself in this case," as respondents claim (p. 6).

(4) On page 8 of their brief in opposition, respondents argue that certiorari should not be granted because "[s]uch review would necessarily be without the benefit of a reliable trial court opinion, since the Court of Appeals concluded that the trial court's findings in many crucial areas were 'clearly erroneous,'" etc. The correctness and completeness of the District Court's opinion are issues for review. Respondents thus assume as established precisely what is in dispute.

(5) On page 9 of their brief in opposition, respondents affirm that "petitioners have repeatedly misrepresented plaintiffs' position as seeking a ward reapportionment plan in which the proportion of the wards which are composed of populations which are majority-Black or majority-Puerto Rican equals the Black or Puerto Rican proportion of Chicago's total population (Petition 12). That is not and has never been the plaintiffs' position." Yet it was in their abortive attempt to prove that blacks and Puerto Ricans enjoy majority status in a disproportionately low number of wards that plaintiffs presented the expert opinion on probability of Paul Meier, a professor of statistics

(A. 209-229). See also the testimony of plaintiffs' demographer, Pierre de Visé (A. 188-190).

(6) On page 10 of their brief in opposition, respondents concede that the correct rule of law is, as stated on page 7 of our petition, that "there is no principle requiring a minority racial or ethnic group to have any particular voting strength reflected in the legislative districting." Therefore, since the plaintiffs' case, as originally conceived and in large measure tried, was based on the proportional representation theory, and since the majority opinion of the Court of Appeals in fact adopted the proportional representation theory in holding that departure from equal proportion constituted evidence of purposeful discrimination, respondents' repudiation of the proportional theory, which it once espoused, is tantamount to a confession of error and constitutes, in itself, sufficient reason for granting certiorari.

(7) On page 9 of their brief in opposition, respondents also declare that "the theory of plaintiffs' case was that purposeful minimization of racial and ethnic voting strength had occurred in establishing the new wards." This theory requires an actual minimization of such voting strength. But, even if, assuming *arguendo* only, there was a purpose to minimize, the record establishes that no minimization was effected. As stated on page 20 of our petition for certiorari, the total population of the City of Chicago, as shown by the 1970 census figures available at the time the ordinance was enacted, was 3,329,090, the goal of the reapportionment was to draw wards each containing 1/50 of that number, or 66,582, the reapportionment was found by both the District Court and the Court of Appeals to approach that goal very closely, Chicago had at that time a black population of 1,102,620, or 32.7% of the total population, in 15 of the 50 wards the majority of the residents are black, these 15 wards elect 30% of the city's aldermen—

a difference of 2.7% between the proportion of the city's population that is black and the proportion of the wards in which a majority of the residents is black—and, of these 15 wards, 14 elected black aldermen and one re-elected a white incumbent, respondent Alderman Despres. Clearly, no actual minimization of black voting strength was effected by the Chicago reapportionment ordinance.

(8) On page 10 of their brief in opposition, respondents state that "the petitioners explicitly recognize that the Court of Appeals applied the correct rules of law in this case," quoting from page 7 of our petition for certiorari. This is absolutely untrue. The quotation used by respondents has been taken out of context. In our statement of the case, we endeavored to indicate (Petition, pp. 7, 8) the inconsistencies of the majority opinion, which begins by disavowing the proportional theory, but concludes by in effect adopting it. The petitioners do not concede that the Court of Appeals applied the correct rules of law in this case. On the contrary, the majority opinion of the Court of Appeals fell into several serious errors of law. That is what this petition for certiorari is about.

(9) On page 11 of their brief in opposition, respondents bluntly state, "Keane lied." Even if, presuming *arguendo* only, Keane was in error in thinking that population was the "sole basis" of the reapportionment, it does not follow that "Keane lied." The respondents failed to recall Keane to the witness stand for further cross-examination; respondents made no attempt in the trial court to attack Keane's credibility.

(10) On page 11 of their brief in opposition, respondents deny that the Court of Appeals decided this case on the basis of the motives of individual legislators. Of the 27 pages of the majority opinion, 14 pages (Appendix B, pp. B8-B20, B24, B25) are devoted to an attempted analysis

of the motivation of two legislators, Keane and Wigoda, and are indeed almost entirely a query into the motivation of Alderman Keane, who, no matter how influential, was only one alderman out of 50.

(11) On page 12 of their brief in opposition, respondents gracelessly state, "The petitioners seek to mislead this Court into thinking that there was substantial conflicting evidence introduced at trial." The respondents err in stating there was no conflicting evidence. Respondents' star witness, Taylor, one of the student interns, was contradicted by the other two student interns—by Kazemek, who was called by the plaintiffs (A. 663-707; Ad. A. 754-765), and by Mrs. Eme, who was a Court's witness (A. 707-747; Ad. A. 766-780). Taylor was also contradicted by defendants' witness, Bell (A. 493-525a; Add. A. 701-738). Taylor, Kazemek, Mrs. Eme and Bell were the only witnesses who testified concerning any remarks allegedly made by Aldermen Keane and Wigoda concerning the students' map. Alderman Hoellen's testimony concerning a comment he claimed was made to him elsewhere by Alderman Wigoda (A. 120-124; Ad. A. 297-338) was expressly contradicted by Wigoda (Ad. A. 338-348).

(12) On page 13 of their brief in opposition, respondents state, "[T]he Court of Appeals at B7-B13 and B14-B20 extensively reviewed not only Mr. Taylor's testimony but also corroborative testimony of at least ten other witnesses, one of whom was petitioners' witness." That is untrue. Taylor was corroborated by no one; he was contradicted by three witnesses. Murray, the only other witness testifying about the student map (A. 625-662), had no personal knowledge of any prejudicial remarks alleged to have been made by any member of the City Council. As for witnesses concerning anything other than the students' map, Alderman Hoellen, a minority member, was, as already stated, sharply contradicted by Alderman Wigoda.

Plaintiff Alderman Despres (A. 126-149; Ad. A. 349-369) testified to his personal opinion (A. 135) that the ward lines were drawn on racially discriminatory lines. Despres also stated in general terms (A. 144, 145) that the aldermen were acutely aware of the racial composition of the city and testified, conclusorily and self-servingly, that that subject "preoccupies aldermen almost pathologically" (A. 145). Plaintiff Alderman Cousins who also testified (A. 221-258; Ad. A. 464-555), outlined the racial distribution of the population of Chicago and bore witness to the unequal opportunities for housing he said are afforded blacks in the city. He testified to certain predominantly black census tracts being taken out of one ward and replaced by predominantly white census tracts, but his recollection was contradicted by the transcript of the proceedings in the City Council. Cousins also said Alderman Keane had remarked to him that he (Cousins, a black) would not want territory with a predominantly Polish population in his ward—obviously a judgment of practical politics and not a racist expression. The other witnesses for plaintiffs were either parties—intervenor Mrs. Leahy (A. 783-804; Ad. A. 828-833), who testified that the regular Democratic organization had taken its own census of her precinct—or statisticians (Meier) or demographers (de Visé, Hauser, Guard) or political candidates or activists (Lopez, Rubin Singer, Rose, Simpson) or law clerks working for plaintiffs' counsel (Matyola), who testified to the racial distribution of the population of Chicago, the probability of achieving proportional representation for blacks, Puerto Ricans and "independents" in the City Council, and the drawing of possible alternative ward maps. None of the witnesses offered any evidence of purposeful racial gerrymandering. On the contrary, plaintiffs' expert witness on demography, Pierre de Visé, candidly stated (A. 188):

"I do not think that race was a major consideration. I think that the major consideration was probably the retention of the old wards."

(13) On page 15 of their brief in opposition, respondents endeavor to explain away the obvious crudity of the students' map by attributing that to its being "based upon the incomplete census data available at the time it was being drafted." The fact of the matter is that the students' map was crude, not because it was based on incomplete census returns, but because it woefully failed to achieve equality of population of the wards, on the basis of the incomplete census returns. Far from achieving the goal of 50 wards as nearly as possible mathematically equal in population on the students' map the most populous ward was their 17th with 77,826 and their least populous ward was their 45th with 54,946—a spread of 22,880—more than one-third of the students' median of 66,400. This is hardly mathematical equality. In contrast, on the official ward map adopted by the City Council, there is a spread of no more than 9/10ths of one percent between the most populous and the least populous ward.

CONCLUSION.

In view of the inability of the respondents to address themselves to the issues presented in the petition without grossly distorting the record, the need for plenary review by this Court of the majority opinion below is indisputable. Indeed, petitioners suggest that summary reversal is now in order.

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